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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 55

UNITED STATES, PETITIONER

vs.

ALLEN KAISER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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1 In the United States Court of Appeals for the
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Appendix to Appellant's Brief—Filed May 29, 1958

United States District Court—Eastern District of Wisconsin

Civil Action No. 56-C-162

ALLEN KAISER, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Complaint

The above named plaintiff, by Max Raskin, his attorney, alleges as follows:

1. Plaintiff, Allen Kaiser, is a citizen of the State of Wisconsin, and resides at 1710 North 9th Street, in the city and county of Sheboygan, state of Wisconsin,

2. Upon information and belief, on or about the 1st day of July, 1953, George M. Reisimer became the duly appointed, qualified and acting District Director of the Internal Revenue Department for the District of Wisconsin, and has continued to act as such during all of the times hereinafter mentioned.

3. This action is brought against the defendant, United States of America, pursuant to Title 28, U.S. Code 1346 as amended July 30th, 1954, and Section 74.22 of the Internal Revenue Code of 1954.

4. This action arises under the laws of the United States providing for internal revenue as hereinafter more fully appears.

5. On or about the 15th day of April, 1955, plaintiff filed an income tax return for the taxable year 1954, with the office of the Director of Internal Revenue of the United States, for the District of Wisconsin, showing income tax withheld
2 in the sum of \$388.84; a tax liability in the sum of \$359.00, and claiming a refund in the sum of \$29.84.

6. Thereafter, and on or about the 17th day of February, 1956, the Director of Internal Revenue of the United States, for the District of Wisconsin, filed a report of individual income tax audit changes, Form 1902, increasing the alleged

income of the plaintiff in the amount of \$565.54 and correcting the adjusted gross income to \$3,235.02, and further, showing and income tax due for the year 1954 in the amount of \$467.00, or an additional tax over and above the amount already withheld and paid, in the amount of \$108.00; copy of such Form 1902 is attached hereto and made a part hereof as if more fully set forth herein, and marked Exhibit A.

7. On the 24th day of July, 1956, pursuant to the demand made by the Director of Internal Revenue of the United States for the District of Wisconsin, plaintiff caused to be paid the sum of \$108.00 claimed as additional tax due, plus interest in the amount of \$8.27, or a total of \$116.27.

8. Thereafter, and on or about the 30th day of July, 1956, and within the period in which a claim might be legally filed under Section 6511 of the Internal Revenue Code of 1954, the plaintiff, pursuant to the provisions of the Internal Revenue Code and the regulations of the Secretary of the Treasury in regard thereto, presented and delivered to the said George M. Reisimer, District Director of the Internal Revenue Department of the United States for the District of Wisconsin, his claim for refund on Form 843, for taxes in the amount of \$108.00 plus interest in the amount of \$8.27, or a total of \$116.27, erroneously paid for the year 1954; copy of such claim for refund is attached hereto and made a part hereof as if more fully set forth herein, and marked Exhibit B.

3 9. Thereafter the said District Director of the Internal Revenue Department of the United States for the District of Wisconsin, notified plaintiff by registered letter that said claim for refund had been disallowed in full; copy of said registered letter with Form 1904 is attached hereto and made a part hereof as if more fully set forth herein, and marked Exhibit C.

10. Plaintiff alleges that for the taxable year 1954 there was erroneously included as taxable income in his tax return as corrected by the said District Director of Internal Revenue for the said year, certain gifts received from International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, and from Local Union 833 UAW affiliated with said International Union, or other sundry sources, the total sum of \$565.54, and he erroneously paid and there was erroneously collected from him a tax thereon in

the sum of \$108.00 plus interest in the sum of \$8.27, or a total of \$116.27.

11. Plaintiff alleges that said gifts did not constitute taxable income under the provisions of Section 102 of the Internal Revenue Code of 1954.

12. By reason of the disallowance and rejection of said claim for refund by the said District Director of Internal Revenue or by the failure of the Commissioner of Internal Revenue to refund said money erroneously paid and collected, the defendant refused and still refuses to refund said amount of \$116.27 to the plaintiff.

13. The above mentioned assessment was erroneously made and illegally exacted from the plaintiff for the reasons set forth in said claim for refund.

Wherefore plaintiff demands judgment against the defendant in the sum of \$116.27 with interest thereon from the 24th day of July 1956, the date of payment of said tax, together with the costs and disbursements of this action.

(S) Max Raskin,

MAX RASKIN,

Attorney for Plaintiff,

Suite 1805, Wisconsin Tower Building,
606 West Wisconsin Avenue, Milwaukee, Wis.

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UNITED STATES VS. ALLEN KAISER

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Exhibit A to Complaint

Form 1040
(Rev. 3-59)U.S. Treasury Department - Internal Revenue Service
BUREAU OF INTERNAL REVENUE TAX ADMINISTRATION

Name and Address of Taxpayer	Filing Status Married	Date of Report 3/17/60
Allen Kaiser 227 Georgia Ave. Chattanooga, Tenn.	Date Claim Filed	How paid (or period) 12/31/59
Examining Officer L. J. Koon		

Type of Return <input checked="" type="checkbox"/> Separate <input type="checkbox"/> Joint <input type="checkbox"/> Head of Household	Form No. 1040
Adjusted Gross Income Shown on Return	\$ 3679.18
2. Increase in income	563.94
3. Corrected adjusted gross income	3215.00
4. Tax (with 1 allowable exemption)	667.00
5. Less: A. Dividends received credit B. Retirement income credit C. Other allowable credits if deductions itemized	753.94
6. Balance (line 4 less sum of items in line 5)	667.00
7. Line 6 self-employment tax shown on return as corrected	
8. Total corrected income tax liability	667.00
9. Total tax shown on return	359.00
10. Statutory deficiency or difference between lines 8 and 9	108.00

UNITED STATES VS. ALLEN KAISER

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EXHIBIT A (continued)

STATEMENT OF ADJUSTED TAX AND CH OF THE OVERSEAS

	Shown on return		As corrected	
11. Total income tax liability		\$ 100.00		\$ 100.00
12. Less net adjustments				
A. Income tax withheld	\$ 381.84		\$ 381.84	
B. F.I.R.A. tax credit				
C. Payments on estimated tax				
D. Previous assessments				
E. Sum of items A through D	\$ 381.84		\$ 381.84	
F. Debit previous returns w/ or credits	\$ 29.54	\$ 29.00	\$ 29.54	\$ 29.00
13. Additional tax due		none		\$ 100.00
14. Penalty, if any, as explained on reverse				

For explanation of adjustments see reverse

(Reverse side of Exhibit A)

Information on file in this office discloses you received strike benefits in the amount of \$455.54 during the year 1954. Such benefits constitute income, subject to tax, as defined in Section 61 (a) of the Internal Revenue Code of 1954. Accordingly, the income reported by you has been increased to include the above amount.

Exhibit B to Complaint

Form 1041 (Rev. Jan. 1955)	U.S. TREASURY DEPARTMENT - SERVICE OF INTERNAL REVENUE CLAIM YOU'RE PAID WITH THE DUTY FREE IMPORTATION WHERE ADDITIONAL HAS MADE ON TAX PAID	Claimant's Name Date received
The claimant must fill in the blank below the kind of claim filed, and fill in, where required:		EXHIBIT B.
<input type="checkbox"/> Refund of Taxes Illegally, Incorrectly, or Excessively Collected. <input type="checkbox"/> Refund of Amount Paid for Stamp, License, or Used to Buy or Return. <input type="checkbox"/> Allowance of Tax Accrued (not applicable to estate, gift, or income taxes).		
PLEASE TYPE OR PRINT PLAINLY		
Name of taxpayer or purchaser of stamp Allen Kaiser		
Address and phone 1710 North 9th Street. Sheboygan, Wisconsin		
State in which claim was filed Wisconsin		
Name and address shown on return, if different from above Allen Kaiser 827 Georgia Avenue Sheboygan, Wisconsin		
Kind of tax Income		
Period - If for tax reported on annual basis, please separate from the cash taxable year From Jan. 1st to Dec. 31st '55		
Amount of claimant's (Date of payment) \$ 167.00 July 26th, 1956		
Date change was paid from the Government Amount to be refunded \$168.00 plus interest or a total of \$116.27		
Amount to be charged that applicable to tax (estate, gift, or income)		
The claimant believes that this claim should be allowed for the following reasons:		
<p style="margin: 0;">Taxpayer claims that the relief and assistance given him by the International Union, the Local Union, or other sources by reason of his unemployment in connection with the Kohler strike, is not income and not taxable under the law.</p>		
Use reverse if space is not sufficient.		
I declare under the penalties of perjury that this claim includes my accompanying schedule and statement and has been examined by me and to the best of my knowledge and belief is true and correct.		
Signed <u>/s/ Allen Kaiser</u>		
Dated <u>July 27</u> 1956		

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to establish the Commissioner of the Internal Revenue Service.
2. If a joint return was made and filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one has income.
3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authorized copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.
4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the decedent, certified copies of the latter decedent's, letters of administration,

trustee, or other similar evidence must be attached to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

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Exhibit C to Complaint

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Milwaukee 1, Wis.

August 6, 1956

In reply refer to

REGISTERED MAILCOL. AC. CL.
No. 349

Allen Kaiser
 1710 N. 9th Street
 Sheboygan, Wisconsin

Dear Mr. Kaiser:

In re: Claim for refund of

Type of Tax

Income

Amounts

\$108.00 plus int.

Periods

1954

Careful consideration has been given to your claim as described above, and upon the facts and circumstances in the case it has been determined that it is not allowable. Accordingly, your claim has been disallowed in its entirety.

In accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code of 1939 and Section 6532 (a) (1) of the Internal Revenue Code of 1954, this notice of disallowance in full of your claim is hereby given by registered mail.

By Direction of the Commissioner.

Very truly yours,

/s/ Geo. Reiskner

Geo. Reiskner
 District Director

HR:ar
 Encl-Form 1904

FL-106A

Exhibit C

NO CHANGE REPORT

Name and address on latest return enclosed (or present name and address if different) Allen Kaiser 1720 N. 9th Street Milwaukee District Director of Internal Revenue Wisconsin	Date of report August 6, 1956 Field <input checked="" type="checkbox"/> Office <input checked="" type="checkbox"/> Complete <input checked="" type="checkbox"/> Partial <input type="checkbox"/> Name of audit Milwaukee, Wisconsin Return from date 7/31/56
---	---

Related Cases

None

It is recommended that the return(s) indicated below be accepted as previously adjusted since examination establishes that further action would not result in a material change in tax liability. The following amounts of income and tax liability are reflected in the return(s) recommended for acceptance:

Year ended (or period)	Adjusted gross income as previously adjusted	Tax liability as previously adjusted
December 31, 1956	\$3335.08	\$67.00

Explanation of unusual items

The claim was filed July 27, 1956, and received July 31, 1956, claiming strike benefits from 1955. It has been rejected for the reason that such benefits constitute income, subject to tax, as defined in Section 61(a) of the Internal Revenue Code of 1954.

Enclosures

None

Examining Officer

/s/ Curtis C. Redburn

Curtis C. Redburn

Approved by (Signature of reviewer)

/s/ E. W. Brown

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In the United States District Court

Answer

The defendant, the United States of America, by its attorney, Edward G. Minor, United States Attorney for the Eastern District of Wisconsin, for answer to the complaint herein states:

1. The allegations contained in paragraph 1 of the complaint are admitted.

2. The allegations contained in paragraph 2 of the complaint are admitted.

3. The allegations contained in paragraph 3 of the complaint are admitted.

4. The allegations contained in paragraph 4 of the complaint are admitted.

5. The allegations contained in paragraph 5 of the complaint are admitted.

6. The allegations contained in paragraph 6 of the complaint are admitted.

7. The allegations contained in paragraph 7 of the complaint are admitted.

8. For answer to the allegations contained in paragraph 8 of the complaint, defendant admits that Exhibit B referred to therein is a copy of plaintiff's claim for refund of the tax and interest sought to be recovered in this action, but defendant specifically denies the allegations contained in that refund claim which are not either specifically admitted or denied herein.

Further answering the allegations contained in paragraph 8 of the complaint, defendant denies that the additional income tax of \$108 and interest thereon of \$8.27, totalling \$116.27 referred to therein was erroneously assessed, collected, or paid; and defendant denies that plaintiff is entitled to any recovery whatsoever in this action.

11 9. The allegations contained in paragraph 9 of the complaint are admitted.

10. For answer to the allegations contained in paragraph 10 of the complaint the defendant admits that the District Director of Internal Revenue referred to therein included as taxable income in plaintiff's tax return as corrected by said Director for the taxable year 1954, the total sum of \$565.54 received by plaintiff in that year from International Union,

United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, and from Local Union 833 UAW affiliated with said International Union, or other sundry sources, but the defendant specifically denies that said amounts totalling \$565.54 were gifts; and specifically denies that said amounts were erroneously included as taxable income in plaintiff's tax return as corrected by the said District Director of Internal Revenue for that year.

Further answering the allegations contained in paragraph 10 of the complaint, the defendant specifically denies that plaintiff erroneously paid and that there was erroneously collected from him a tax in the amount of \$108.00 plus interest in the sum of \$8.27, or a total of \$116.27, upon the amounts of \$565.54 received by plaintiff in the taxable year 1954 from the sources described in paragraph 10 of the complaint.

11. For answer to the allegations contained in paragraph 11 of the complaint, the defendant specifically denies that the amounts referred to therein totalling \$565.54, which plaintiff received in the taxable year 1954 from the sources described in paragraph 10 of the complaint herein, were gifts within the meaning of Section 102 of the Internal Revenue Code of 1954, and defendant also specifically denies that said amounts
12 are excludable from plaintiff's taxable gross income under the provisions of Section 102 of the Internal Revenue Code of 1954.

12. The allegations contained in paragraph 12 of the complaint are denied, except defendant admits that it has refused and still refuses to refund the plaintiff the sum of \$116.27 sought to be recovered in this action.

13. The allegations contained in paragraph 13 of the complaint are denied, and defendant specifically further denies each and every allegation contained in plaintiff's claim for refund referred to therein not hereinbefore either specifically admitted or denied.

Wherefore defendant prays that the complaint herein be dismissed and that judgment be entered against the plaintiff and in favor of the defendant, and that defendant recover its costs incurred in defending this action.

(S) Edward G. Minor,
EDWARD G. MINOR,
United States Attorney.

In the United States District Court

Stipulation of facts

Mr. RASKIN. Your honor, the attorneys for the Government and for the plaintiff have entered into a joint stipulation which we ask to be marked as "Exhibit A."

The COURT. She uses numbers.

Mr. RASKIN. The reason we wanted alphabetical design is because there is reference in the stipulation itself to exhibits which are attached and marked by number.

The COURT. Then will you mark this "A"?

Exhibit A is received by joint request.

I believe that this Stipulation of Fact should be read to the jury, and if counsel believe now is the time I will
13 ask the Clerk to read it to the jury.

Mr. RASKIN. We have no objection to it being read
now.

The COURT. Mr. Clerk, will you take the witness stand and read the Stipulation slowly enough so the jury will understand it?

Mr. QUICK. Will the court ask the jury to indicate if they don't hear, any one of them?

The COURT. Members of the Jury, in case any of you do not hear, just raise your hand and I will ask the Clerk to talk louder.

I want to again tell you that the facts stipulated to by the parties are binding upon you. The conclusions that you come to from those facts will be yours, and counsel will probably argue to you as to what conclusion you should come to, but whatever is in this stipulation is absolutely binding so far as the fact is concerned.

Now, if you will, listen to this stipulation; and, if you will, read it distinctly, Mr. Goldberg.

(Whereupon the Deputy Clerk took the stand and read the Stipulations of Facts in words and figures as follows, to-wit:)

"ALLEN KAISER, PLAINTIFF**VS.****UNITED STATES OF AMERICA, DEFENDANT***"Stipulation of facts for presentation to jury*

"It is hereby stipulated and agreed by the parties hereto, through their respective attorneys, that the facts herein stated are true and the documents referred to herein or annexed hereto as exhibits are true copies of the originals and/or true excerpts from the original documents from which such excerpts were taken, and may be admitted in evidence without further authentication, except that each party reserves the right to object to the admissibility in evidence of the documents and facts herein related, and the excerpts from the documents herein referred to, on the grounds of their immateriality and irrelevancy to the issue involved herein. In addition, each party reserves the right to offer in evidence other documents and additional evidence not inconsistent with the facts herein admitted to be true, subject, however, to an objection to their admissibility on the grounds of immateriality and irrelevance.

"1. This is a civil action whereby the plaintiff is seeking a refund of individual income tax in the amount of \$108.00 plus interest thereon of \$8.27, making a total of \$116.27, paid by him on July 24, 1956, to the then District Director of Internal Revenue of the United States for the District of Wisconsin.

"2. This action is brought under the provisions of Title 28 U.S.C., Sec. 1346, as amended by July 30, 1954, and pursuant to Section 7422 of the Internal Revenue Code of 1954, and arises under the laws of the United States of America providing for internal revenue.

"3. Plaintiff was at the time he paid the income tax sought to be recovered herein and is now a citizen of the State of Wisconsin and resides at 1710 North 9th Street in the City and County of Sheboygan, Wisconsin.

"4. On or about the 15th day of April, 1955, plaintiff filed with the office of the District Director of Internal Revenue for the District of Wisconsin, his federal income tax return for the calendar year 1954, showing an income withheld in the sum of \$388.84; an admitted tax liability of \$359.00, and claiming therein a refund of the sum of \$29.84"

15 Mr. RASKIN. If the court please, I think the Clerk left out the word "tax"—"Income tax" rather than "an income withheld."

The Court. Will you read that over correctly?

The DEPUTY CLERK. "On or about the 15th day of April, 1955, plaintiff filed with the office of the District Director of Internal Revenue for the District of Wisconsin, his federal income tax return for the calendar year, 1954, showing an income tax withheld in the sum of \$388.84; an admitted tax liability of \$359.00, and claiming therein a refund of the sum of \$29.84.

"5. After investigation and audit of plaintiff's income tax return for the calendar year 1954, the District Director of Internal Revenue for the District of Wisconsin, on or about February 17, 1956, filed a report of individual income tax audit changes on Treasury Department Form 1902, wherein he increased plaintiff's taxable income in the amount of \$565.54, thereby correcting his adjusted gross income to \$3,235.02, which adjustment increased plaintiff's income tax liability for the year 1954 to \$467.00 and resulted in an additional income tax of \$108.00 over and above the amount withheld and paid by him for the taxable year 1954.

"The explanation of the adjustment to plaintiff's taxable income for 1954 stated on Form 1902 read as follows:

"Information on file in this office discloses you received strike benefits in the amount of \$565.54 during the year 1954. Such benefits constitute income, subject to tax, as defined in Section 61(a) of the Internal Revenue Code of 1954. Accordingly, the income reported by you has been increased to include the above amount."

16 "6. On July 31, 1956, plaintiff filed a timely claim for refund of the income tax sought to be recovered herein.

In his claim for refund, plaintiff stated that it should be allowed for the following reasons, to-wit:

"Taxpayer claims that the relief and assistance given him by the International Union, the Local Union, or other sources by reason of his unemployment in connection with the Kohler strike, is not income and not taxable under the law."

"7. Under date of August 6, 1956, plaintiff was informed by the office of District Director of Internal Revenue for the District of Wisconsin, that his claim for refund, above men-

tioned, was rejected for the reason that the strike benefits received by him in 1954 constituted income subject to tax, as defined in Section 61(a) of the Internal Revenue Code of 1954; and under that same date there was dispatched to plaintiff, in accordance with the requirements of Section 3772(a)(2) of the Internal Revenue Code of 1939 and Section 6532(a)(1) of the Internal Revenue Code of 1954, a registered notice of disallowance in full of his claim for refund. This suit being instituted on August 8, 1956, was, therefore, timely filed.

"8. In 1954 and prior thereto plaintiff was an employee of the Kohler Company at Sheboygan, Wisconsin, and in 1954 he worked on the water test line at the pottery, at a wage of \$2.16 an hour.

"9. On February 23, 1954, the Kohler Company of Sheboygan, Wisconsin, entered into a written agreement with the International Union, UAW CIO, and its Local Union 833, also of Sheboygan, Wisconsin; excerpts from which are attached hereto and marked Exhibit I and made a part hereof."

The COURT. Do counsel want the exhibit read at this point, so that the jury follow it better?

Mr. RASKIN. If the exhibits are going to be read, I think they ought to be read where they are referred to.

The COURT. Make a note of your place and read Exhibit I attached.

17 The jury will understand what is now going to be read are excerpts from the contract. Counsel have taken the contract and eliminated the portions that they did not feel material, and parts that are going to be read are the parts that both counsel thought were material to the outcome of this case.

The DEPUTY CLERK. I take it Exhibit I is the first page following the signatures?

Mr. RASKIN. Yes.

The DEPUTY CLERK:

"EXHIBIT I

"Excerpts From the Agreement Between Kohler Company and the U.A.A.A.I.W.A., C.I.O. and its Local 833 February 23, 1953

"Article I—Union recognition and activities

"Section 1. Recognition:

"The Company, accepting the results of the election conducted by the National Labor Relations Board June 10-11,

1952, recognizes the Union as the sole collective bargaining agency in all matters pertaining to wages, hours and working conditions, for all production and maintenance employees in the bargaining unit as defined by the National Labor Relations Board in its decision of February 26, 1951, in Case No. 13 R.C. 1506 (93 NLRB 398). The specific job classifications included in and excluded from the bargaining unit are as specified in Supplement 'A' hereof."

Is that "A" here somewhere?

Mr. RASKIN, No.

The DEPUTY CLERK. "When the words 'he,' 'him,' or 'his' are used in this agreement, they shall refer to and mean both male and female employees.

18. "Section 3. Limitation or Interruption of Production

"(b) The Union will not cause, encourage or support any sitdown strike, any slow down, or any reduction or any limitation of production, and during the life of this contract will not cause, encourage or support any strike because of any dispute which is subject to the arbitration procedure provided by this agreement. Any employee engaging in conduct violating this provision shall be subject to discipline by the Company.

"Article XVIII—general provisions

"Section 3. Waiver:

"The parties acknowledge that during the negotiations which resulted in this agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining.

"Therefore, the Company and the Union for the life of this agreement, except as provided in section 2 of this article, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this agreement or with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this agreement.

"Article XIX—effective period

"This Agreement shall become effective when signed by the parties hereto and ratified by the Local union membership and approved by the International Executive Board of the Union.

"This contract will remain in full force and effect until March 1, 1954, and thereafter from year to year unless sixty (60) days prior to March 1, 1954, or sixty (60) days prior to any March 1 of any year thereafter, the Company notifies the Union or the Union notifies the Company of its desire to terminate or change the contract, in which case the contract shall terminate sixty (60) days after such notice unless further extended by mutual agreement of the parties."

The COURT. Is that all of the exhibit?

The DEPUTY CLERK. That's Exhibit I.

The COURT. Then you might go back to the stipulation.

The DEPUTY CLERK. "10. Early in December, 1953, the Kohler Company advised the International Union, UAW-CIO, and its Local Union 833, of its intention to terminate the contract of February 23, 1953. The contract expired on March 1, 1954, and the parties operated without a contract between March 1, 1954 and April 5, 1954.

"11. On March 4, 1954, the Kohler strike was authorized by the members of Local Union 833, and became effective on April 5, 1954.

"12. At the time the Kohler strike was authorized the plaintiff herein was an employee of the Kohler Company at Sheboygan, Wisconsin, but he was not a member of the International Union and did not join that Union until August 19, 1954.

20 "13. Annexed hereto as Exhibit w and made a part hereof are excerpts from the Constitution of the International Union UAW-CIO, adopted in March 1953, which was in effect in 1954 as the time plaintiff applied for membership in the Union."

The COURT. Read the exhibit.

The DEPUTY CLERK:

"EXHIBIT 2

"Re: ALLEN KAISER v. UNITED STATES, DC ED Wis. Civil
No. 56-C-162

"Excerpts From Constitution of International Union Dated
March 1953

"1953

"Article 1—Name

"The Organization shall be known as the 'International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), hereinafter referred to as the International Union.

"Article 2—Objects

"Section 1. To improve working conditions, create a uniform system of shorter hours and higher wages; to maintain and protect the interests of workers under the jurisdiction of this International Union.

"Section 2. To unite in one organization, regardless of religion, race, creed, color, political affiliation or nationality, all employees under the jurisdiction of the International Union.

"Section 3. To improve the sanitary and working condition of employment within the factory, and in the accomplishment of these necessary reforms we pledge ourselves
21 to utilize the conference room and joint agreements;
or if these fail to establish justice for the workers under the jurisdiction of this International Union to advocate and support strike action.

"Article 12—Duties of the International Executive Board

"Section 1. The International Executive Board shall execute the instructions of the International Convention and shall be the highest authority of the International Union between Conventions, subject to the provisions of this Constitution, and shall have the power to authorize strikes, issue charters and punish all subordinate bodies for violation of this Constitution.

"Section 15. If and when a strike has been approved by the International Executive Board, it shall be the duty of the

International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union.

"1953

"Article 16—Initiation fees and dues

"Section 4. The Local Union shall set aside five cents (.05) of each month's dues payment as a Special Citizenship Fund to be used for the purpose of strengthening democracy by encouraging members, and citizens generally, to register and vote in community, state and national elections and to carry on organizational and educational programs directed towards the achievement of an ever higher understanding of citizenship responsibility and the need for active participation in the affairs of a free and democratic society. Local Unions are obligated to carry out such programs in conjunction with city, county, and state CIO Councils. Five cents (.05) of each month's dues payment must be laid aside by the Local Union as a special fund to be used in case of strike or lockout. Three cents (.03) of each month's dues payment must be laid aside by the Local Union as a special fund to be used only for educational or recreational purposes as outlined in Article 26 of this Constitution.

"Section 11. All Local Unions shall pay to the International Union a per capita tax of one dollar and twenty-five cents (\$1.25) per month per dues-paying member, twenty-five cents (.25) of which shall be set aside in a special fund as the International Union Strike Fund, to be drawn exclusively for the purpose of aiding Local Unions engaged in authorized strikes and in cases of lockout, and for that purpose only, and then only upon a two-thirds vote of the International Executive Board. * * *

"Section 13. All per capita taxes, and all other monies collected for the International Union shall be transmitted to the International Secretary-Treasurer by the twentieth of each month following collection. All such per capita taxes and other monies are strictly the property of the International Union and in no case shall any part thereof be used by Local Unions, except upon permission of the International Executive Board.

"Article 49—Strikes

✓"Section 1. Whenever any difficulty arises within the jurisdiction of any Local Union within the shop involved, between its members and any employer or employers, growing out of reduction in wages, lengthening of hours of labor, or other
23 grievances incident to the conditions of employment, or whenever any Local Union desires to secure for its members an increase in wages, a shorter work day or other changes in the conditions of employment, the Local Union involved shall call a meeting of all members to decide whether the proposed changes shall be accepted or rejected. The majority vote of those present and voting on the question shall decide. If, as a result of this decision, a strike vote is decided upon, the Local Union Executive Board shall notify all members, and it shall require a two-thirds vote by secret ballot of those voting to declare a strike. Only members in good standing shall be entitled to vote on the question of declaring a strike.

"Section 5. Before a strike shall be called off, a special meeting of the Local Union shall be called for that purpose, and it shall require a majority vote by secret ballot of all members present to decide the question either way. Wherever the International Executive Board decides that it is unwise to longer continue on existing strike, it will order all members of Local Unions who have ceased work in connection therewith to resume work and thereupon and thereafter all assistance from the International Union shall cease.

"Section 6. Any Local Union engaging in a strike which is called in violation of this Constitution and without authorization of the International President and/or the International Executive Board shall have no claim for financial or organizational assistance from the International Union or any affiliated Local Union."

"14. Plaintiff was not present at the meeting of the Union when the strike vote was taken. Plaintiff was on strike at the time he was admitted to membership in the Union; and, during the calendar year 1954, beginning with May 4th,
24 1954, he received from the International Union, strike benefit payments totaling \$565.54 and at least up to April 6, 1957, he continued to receive strike benefit payments from the Union.

"15. Plaintiff did not pay any initiation fee upon becoming a member of the International Union, and because of his unemployment status has not paid any dues as a member thereof.

"16. At the time of the declaration of the Kohler strike the International Union had \$9,141,488.00 in its strike fund; and Local Union 833 had in its strike fund \$63,677.88, which latter amount was transferred by it to the International Union in that year, and was set up in a special bank account to deal with strike expenditures and strike needs of Kohler workers.

"17. At the Fifteenth Constitutional Convention of the International Union, UAW-CIO, there was adopted a resolution No. 26, relating to the support of Union members on strike, an excerpt from which is annexed hereto as Exhibit 3, and made a part hereof."

The COURT. Read Exhibit 3.

The DEPUTY CLERK:

"EXHIBIT 3

"Excerpts From Resolution No. 26 Adopted at the 15th Constitutional Convention of the International Union UAW-CIO in March 1955

"Resolution No. 26—Support of members on strike

"Whereas the UAW-CIO believes in peaceful collective bargaining. It is our aim to reach reasonable agreements through peaceful negotiations, without resort to the strike
25 weapon since we are well aware that the effects of a strike are felt not only by the employer, but preeminently by the workers themselves, and in lesser degree by the general public.

"CIO unions do not lightly decide to strike, or engage in walkouts for frivolous nor minor reasons. We do not strike until every other legitimate means of arriving at a satisfactory settlement has been exhausted.

"In the final analysis, however, a strike is, in many situations, the workers' only weapon—and recourse to it their only hope of winning decent wages, hours, and working conditions.

"Unfortunately many of our brothers and sisters are still forced to resort to strike action because employers are unwilling to settle disputes on their merits preferring, instead, to use raw, economic force.

"Resolved, That this Convention go on record in support of our brothers and sisters now on strike, and that we resolve to give them every legitimate kind of assistance toward the successful conclusion of their struggle. We must secure as broad a support as is possible for these members, and members who may walk future picket lines; and be it finally

"Resolved, That we go on record in censure of any and all employers who seek to deprive workers of decent contract standards by resorting to the law of the jungle."

"18. On March 6, 1952, the International Union UAW-CIO, issued a printed Administrative Letter numbered 8, to all Local Unions, affiliated with it, wherein it stated the International Union's policy in respect to the use of Union funds during strike periods. Annexed hereto as Exhibit 4, and made a part hereof, are excerpts from that letter.

26 "There has been no variation in the basic principles contained in this administrative letter."

"EXHIBIT 4

**"Excerpts From UAW-CIO Administrative Letter No. 8,
Dated March 6, 1952**

"To all local Unions

"The handling of the emergency health and welfare problems of our members and their families is one of the most important tasks facing our Union during strike periods. We should do everything possible to minimize the hardship of our members and their families during strike periods by using the resources of the community and our Union.

"The International Union, UAW-CIO, has established a Community Services Program in order to assist our members in making full use of community services. These health and welfare agencies have been organized in the community to render services, including financial assistance, medical, hospital and nursing care, legal aid, unemployment compensation (in New York State), family and child care and other such services. These services can be used by our members during strike periods as well as in lay-off periods. Our members support

and pay for such services through taxes for Federal, state and local public agencies and through contributions for voluntary community agencies.

"The International Union, UAW-CIO, has also established a Strike Fund to further assist Local Unions in winning current strikes and to build a fund to protect our members in any future strikes. The Strike Fund of the International Union, UAW-CIO, is not large enough to provide strike assistance on the basis of right, and is not sufficient to meet all of the needs of our members during strike periods.

"The Strike Fund of the International Union, UAW-CIO, is maintained by setting aside 25 cents per month per member from the per capita taxes received. On an annual basis, each member contributes \$3.00 to the Strike Fund. It should be obvious to anyone that it is impossible to build an adequate Strike Fund to take care of all of the needs of our members with these limited funds.

" * * * the International Executive Board, at its meeting at Detroit, Michigan, on February 5, 1952, adopted the following policy:

"1. All Local Unions must use the services offered by the community agencies in rendering financial assistance, medical, hospital, nursing care, legal aid and other such services before using Local Union Strike Funds of the International Union Strike Funds.

"2. Local Union Strike Funds can only be used in conformity with the policies of the International Union.

"3. Assistance may be given by the Local Union to its members at the beginning of the third week of the strike. In extreme emergencies, the Regional Director may authorize strike assistance before the beginning of the third week.

"4. The International Unions will supplement Local Union Strike Funds after the Local Unions have expended 75 per cent of their funds in accordance with these stated policies; or, in Amalgamated Local Unions, after the Unit on strike has expended 75 percent of its proportional share of the Local Union Strike Fund.

"5. Emergency strike assistance may be given to strikers who cannot meet their minimum needs with their own individual resources, who cannot qualify for such as-

28 assistance from community agencies. Local Unions requiring strike assistance from the International Union must make their application for assistance to their Regional Director. * * *

"19. The International Union grants strike benefits to non-members of the Union, who participate in a strike, if they do not have sufficient income to purchase food or to meet an emergency situation. The Union treats such non-members on the same basis as members of the Union, but non-members as well as members must be strikers before they may receive assistance from the Union.

"In order to obtain strike benefits from the Union, each applicant must appear before a Union Counsellor who asks him a series of questions which are contained on a printed Counselling form.

"A true copy of the Counselling Form which was prepared by the Union's Counsellor in respect to the application of the plaintiff, Allen Kaiser, for strike benefits, has been identified in the record as plaintiff's Exhibit 3.

"20. The Union makes a distinction between applicants in granting strike benefits to them, depending on their marital status and number of dependents. At the time the Kohler strike aid program began, a single person received a food voucher for \$6.00 per week; a married couple without dependents received a food voucher for \$10.00 a week; a married couple with two children, a food voucher for \$13.85 a week. On June 28, 1954, the Union increased the amount of aid to the people on the Kohler strike: aid for a single person was increased to \$7.50 a week; for a married couple without dependents aid was increased to \$15.00 a week; aid for a married couple with one child was increased to \$18.00 a week.

29 "21. Allen Kaiser voluntarily arrived at the decision to become a member of the union."

TRANSCRIPT OF PROCEEDINGS

ALLEN KAISER called as a witness on behalf of plaintiff.

Direct Examination by Mr. RASKIN:

My name is Allen Kaiser and I live at 1710 North 9th Street, in Sheboygan. I have lived in Sheboygan for 12 years. At present I am employed by the Levitan Fruit Company. I

am 29 years old, married and have 2 children. I married a widow who had the children at the time of the marriage. The children are seven and eleven years old.

I worked for the Kohler Company two years before 1954. I was on the Water Test Line in the Pottery Department.

I did not become a member of Local 833 while I was working for the Kohler Company.

On April 5, 1954, I walked out with the other members on strike. I was not a member of the Union then.

I had no other income at the time of following, after becoming a striker.

I had no other job and was not employed at all. I was in need of assistance so that I could pay rent, and buy food, and I went down to the Union. Not being a member I took a chance in trying and they gave me the assistance that was needed. They did not in any way discriminate because I was not a member.

At the beginning I got food and had my room rent paid. The assistance increased sometime later. I became a member of the Union in August, 1954. No one asked me to become a member.

That is my signature on Plaintiff's Exhibit No. 1, which is an official application for membership, dated August 19, 30 1954. I got this card at the Union office. I did not pay any money for initiation fee or Union dues.

During the year 1954 I did some picketing. I went down to the plant and joined the fellows—stayed there a few hours and went home. No one asked me to do that. I arrived at that decision all by myself.

Cross-examination by Mr. ATHERTON:

I am now a member of the Union.

I never was actually approached in the plant on the subject of joining the Union, so after the strike was started—I believe I was a Union member of the Bus Drivers Union—so I joined Local 833 for the simple reason that being a member—and having my job back at a later date after the strike.

I was not aware at the time I applied for membership in the Union of any benefits I might obtain in the way of relief. I had been obtaining them but I did not know they were going to be raised. I was not informed that the Union had a substantial strike benefit fund from which disbursements were made.

I had my Income Tax made out by a lawyer and he told me he didn't believe it was taxable. Prior to that time I didn't know whether it was taxable or not. I paid my tax and filed a claim in time. When I applied to the Union for strike benefits before I became a member, I was referred by the Union to discuss the matter of benefits with counselors. They didn't ask whether I was a member of the Union or not. They did ask if I was a striker. They just asked me if I was married, where I was living, what I was doing and different things like that, and if I had any independent source of income.

31 Redirect examination by Mr. RASKIN:

When I went to the counselor I signed some form which contained some of the answers that were asked of me. Plaintiff's Exhibit No. 2 is a correct copy of the form that I signed and my signature appears on this copy.

On the back of this Exhibit appears the amount of assistance that I received on the various days. When I was single, in 1954, I got \$7.50 for food and \$9.00 for rent.

I did not receive any cash money to pay the rent—it was paid for me. I did not receive any cash money to pay for food. I was given some kind of a voucher. Plaintiff's Exhibit No. 3 is a copy of a form that was used when I was given a voucher to go and get food at some store in Sheboygan. It was all filled in when I received it.

I did not attend any meetings of Local 833 in either March or April of 1954. I did not attend the meeting where a strike was voted.

Re-cross-examination by Mr. ATHERTON:

When I became a member of the Union I believe I was furnished a copy of the Constitution and By-Laws. I understand the purpose of the Union's calling this strike was to secure seniority, arbitration and better working conditions.

I understood that as a member of the Union I was expected to cooperate in every way with the Union in making the strike against the Kohler Company effective. I understood my cooperation with the Union required me to continue on strike against the Kohler Company and refrain from working for that company until the objective of the strike had been accomplished.

32 ALLAN GRASKAMP called as a witness on behalf of plaintiff.

Direct examination by Mr. RASKIN:

My name is Allan Graskamp. I live at 1810 South 22nd Street, Sheboygan, Wisconsin, and have lived in the City of Sheboygan for 22 years.

I was employed by the Kohler Company for 16 years up to the time of the strike.

I have been President of Local 833 since June, 1953. Local 833 had the bargaining rights at the Kohler Company plant, originally gained in 1950 through the Independent Local Union affiliated with the United Auto Workers, and then in a National Labor Relations Board election in 1922. This election was among all the members in the bargaining unit of the Kohler plant. The strike was called in April, 1954.

There were members of the Union and non-members of the Union who returned to work after the strike was called, and after some of them had previously received assistance. Some members had received assistance and also returned to work.

ALLAN GRASKAMP recalled as a witness.

The strike vote was taken in the month of March, 1954. First there had to be a vote authorizing the Local Union to call a special meeting for the taking of a strike vote and then seven days had to elapse to advertise to the membership that there is going to be a strike vote taken, and then after that elapse of time a meeting is set and a strike vote is taken by secret ballot. At that time about 88.2% voted in favor of the strike.

33 The Local Union is composed of just Kohler workers, people working for the Kohler Company. Local 833 is affiliated with the International UAW. I was active and present during the time that strike assistance was given to various individuals. They didn't lay down any conditions for receiving this assistance. The people that came, came on their own. They served—like the counseling committee, all on their own free will. They volunteered to serve. They were not compelled to do anything. They had just to show that they were in need of it. That they weren't employed some place else. That they didn't have sufficient income to take care of their needs, such as food, shelter, utilities. If they had not received this assistance, they would either get an eviction

notice or their utilities would be shut off—their light or their gas.

Cross-examination by Mr. ATHERTON:

Q. Did the Union expect those who applied for relief—strike benefits to participate in the strike by performing picketing duty, duty in the soup kitchens, and assisting the counselors, or anything of that sort?

A. Did we request them to?

Q. No. Did you expect it?

A. I think you would say it was a moral obligation. It was their strike. They were the only ones to benefit. They were not compelled to. There was many people never participated.

Q. In other words, your testimony now is that the Union did expect them to render picketing service—

A. No. I didn't say that. I said that I felt that the people themselves probably had a moral obligation. We didn't expect them to.

Q. You did not expect them to render any services in the way of picketing duty?

A. We had many people that never participated, and got assistance.

34 Q. I don't think your answer is responsive to my question. The question is, did you expect them to do so, not whether they did or not.

A. I would expect that—we thought they probably would, that they would participate.

It is part of the practice of a strike to picket the employer's business premises to advertise that the people are on a strike. I don't think we would expect any outsider to picket. Although we did have such picketers from other Locals in the community, we did not employ outsiders to perform any picketing duty.

I don't know whether to say "yes" or "no" as to whether you would expect a strike to be effective unless there was picketing done. I have known of instances where there was very little picketing done.

EMIL MAZEY called as a witness on behalf of plaintiff.

Direct examination by Mr. RASKIN:

My name is Emil Maze. I live at Grosse Pointe, Michigan, a suburb of Detroit. I have been the Secretary-Treasurer of the International Union, UAW-CIO for 10 years, continuously.

My basic duties are to handle the money of the Union. I am responsible for receiving the money; I am responsible for expenditures of the organization; I have the responsibility investing the funds of the Union. I am also a Director of the Accounting Department of the Union. I handle the purchasing of the organization. I am a Director of the Veterans Department of the Union; a member of the Policy Committee of the organization. I am a member of the Executive Board and am Acting President in the absence of Walter Reuther.

I have connection with all the Local Unions. We have about 1275 chartered Locals, and I have direct association with all of them. The first contact I had with Local 833 was after the strike took place. I addressed a meeting in front of the plant gates several days after the strike began.

I had no connection with the calling of the strike. I happened to be on vacation at that time. I did not attend any meetings of the Local Union prior to the strike actually being authorized. The only extent of the connection of the International Union with the calling of this strike was that under the terms of our Constitution, in the event the Union and the Company are unable to resolve their differences, a special membership meeting must be called and permission must be granted by the members, by a vote at that meeting, to take strike action. The Local Union, after it takes a strike vote, before it can legally go on strike, must seek strike approval or authorization from the International Executive Board.

The rendering of financial assistance to individual members does not form any consideration in the calling of a strike. Strikes are only called when we cannot resolve the problems with the employer in any other way.

The basic reasons of calling the strike were questions of arbitration, grievance procedure, seniority, wages and social insurances that include the pension, group life insurance, medical insurance, and other various conditions of employment.

When the Company notified the Local Union that it intended to terminate the contract of March 1, 1954, I was advised of the notice at the time it was received by the Local. The first thing I did was to direct a member of the Community Services Department, of which I am a Director, to establish a strike assistance program for the Kohler workers.

The contract terminated on March 1, 1954, and the Union sought to have the Company to agree to extend the contract until an agreement could be reached. The Com-

pany refused and we worked without a contract from March 1 until April 5, 1954. The Local was very desirous of striking earlier, but representatives of the International Union persuaded them to continue to work, to try to work out these questions around a bargaining table.

The basic condition for receiving strike assistance was the need of the individual member who was on strike.

The member must have a need. We worked out a form where we took the name of the applicant for assistance, and asked him a series of questions as to his marital status, the number of children he had, whether he owned his home, whether he had gas, electricity, type of heating unit he had in his home, whether he had a bank account, whether there was more than one person working in the family. We tried to determine it through a series of questions that were prepared after a study of procedures of welfare agencies to try to make a determination without actually investigating the worker at his home to see if he had any.

The only basic difference between our investigation and that of Sheboygan County, for example, which has a staff of investigators that would go out to the home of the workers seeking assistance from the County, is that we in our case depended entirely upon the questionnaire to make our investigation. We didn't have the staff and resources to work more closely. If a member of the Union felt that he was unjustly denied strike assistance, he obviously had the right to either appeal to the Local Union or to appeal to my office because the
37 people who helped, acting as counselors, were all members, in this particular case, of Local 833, and people are human beings, they could make mistakes.

As to the reference in the stipulation that the Local Union had some \$63,000 in its strike fund—that money came into the fund from 5¢ out of each dues received from each member of the Local Union and was set aside in a strike fund. We had other contributions from other Local Unions, both the UAW Locals and Locals outside of the UAW, fraternal organizations, and business men and so on, who made contributions to the Local Union for strike assistance.

The administration of the strike program was in the City of Sheboygan. We had an office and quarters established there. Of course the sources of the funds, the bulk of the funds came from my office in Detroit, from the International Union treasury. The International strike fund currently is

raised by setting aside 25% of the \$1.50 a month we receive in per capita taxes from each member in a special fund known as a strike fund. The only standard that was used to establish their need was a questionnaire that we used to counsel the strikers to try to determine their needs. It was the counseling form, plus the judgment of the individual counselor that determined whether or not a striker would receive strike assistance. There was no distinction drawn between those who were members of the Union and those who were not. The only yardstick we used was to determine whether or not the member had a need, whether he needed money for food, clothing, or shelter. If a striker were employed, he did not receive assistance.

The basic objective was to try to minimize the sacrifices and hardships that were brought about by the unemployment caused by the refusal of the employer to work out a satisfactory agreement. The only yardstick we used was whether or not a need existed. Our counselors did not question a striker as to whether or not he spent time on the picket line or worked in the soup kitchen, or performed any other duty. It was possible somebody could walk in from the street and ask for strike assistance and, obviously, he would not be entitled to it unless he were a striker.

In the event a striker and his family were threatened with the cutting off of electricity or gas we paid the utility bills. Shortly after the strike began the Company refused to continue the Group Life Insurance Program and the Medical Insurance Program, and because of their refusal, the Union picked up the cost of the Group Life Insurance Program, as well as the Medical Insurance. We provided Blue Cross and Blue Shield for all the strikers during the strike. The whole program was based on need, and it was our opinion that a single person did not need as much money for food as a married person and a person that had children or various other dependents would need more money than a couple without children. So, we graduated the amount of assistance we gave the workers on strike. There were no conditions of any kind established outside the fact that he had need. There was no requirement that they perform any picketing duty, or any other kind of duty.

Our counselors had no way of knowing whether a striker did any picketing duty or not, and, obviously, nobody was

penalized for that because that wasn't one of the conditions under which they received strike assistance.

There were persons who received assistance and at some later time returned to work at the Kohler Co. Members of the Union who abandoned the strike by returning to work would not be members of the organization any longer.

39 The bulk of the strike assistance came out of the strike fund of the International Union, but we did receive contributions and donations from various Local Unions, and from people and groups who were friendly to the cause of the Kohler workers. These contributions were not earmarked for any individuals, but I do recall—one of the Local Unions, before Christmas of 1954, specifically donated some money to pay for shoes for the Kohler children. That is the only earmarked fund that I know of. I think we did have some fund earmarked for shoes at one time. The distribution was handled by the Local Union I think. On the matter of toys, they had a special committee dealing with that question.

When it appeared to us that the strike was not going to terminate quickly, we set up employment counseling to assist Kohler workers to obtain jobs elsewhere. The program was quite successful. We were able to help many hundreds of Kohler workers to obtain employment in other plants.

We did not give financial assistance to enable workers to move to other cities. The records were handled in Sheboygan. They were, indirectly, under my supervision. They were handled by one of my staff members who had direct charge of the Counseling Program—his name was Joseph Burns. These accounts were audited. We have a 22-man Auditing Department and we carry on continually auditing of records of Local Unions, and in strike situations we made periodical audits and at least an annual audit of the expenditures and income in a strike situation.

Under the terms of our Constitution, a member of the Union does not have to pay dues unless he has at least 40 hours employment during the month of the calendar 40 worked. In the case of a worker on strike, he receives no income from employment and does not have to pay dues.

Employees on strike are not entitled to receive Unemployment Compensation in the State of Wisconsin. They can in New York and New Jersey. The program of the Union on

strike assistance, as was stipulated, pointed out that members were to use community agencies first before the Union provided any strike assistance. In this particular case, the community assistance available in Sheboygan County was so small, and so much red tape involved in obtaining it, we decided that Kohler workers would not have to seek assistance from the community agencies.

I mean by municipal agency, an agency which derives its funds from taxes. In this case, I believe it would be the Sheboygan County Welfare Agency—I am not sure of the exact name. It is a governmental agency. Municipal agency refers to cities. I think this was a County organization.

Cross-examination by Mr. ATHERTON:

The strike fund was established in order to minimize the hardships on the part of workers and their families in the event they were forced on strike by an employer refusing to settle grievance and problems in collective bargaining matters. These funds were accumulated for strike assistance to members of the Union who are on strike. In the states of New York and New Jersey the striker could draw Unemployment Compensation. In these two states they draw Unemployment Compensation after they have been on strike for 7 weeks. In those states if the Unemployment Compensation received (in either New York or New Jersey) is equivalent to the strike aid they would get under our program, they would draw no
41 assistance at all. If the striker had only a short period of time of qualification for Unemployment Compensation, we would supplement his Unemployment Compensation through our strike assistance program.

The basis of our strike program is to try to meet the emergency needs of our members, and where the Unemployment Compensation is not enough to meet the emergency needs, we would then supplement it with our own funds. It is not a matter of Unemployment Compensation, it is strike assistance. It is not a matter of right, like a worker draws Unemployment Compensation because he has had certain earnings, he has established certain credits and receives his Unemployment Compensation as a matter of right. Strike assistance is not a matter of right—it is a matter of need. He would have to be unemployed as a result of a strike, and he would have to have a need. He could be unemployed as a result of a strike and not have a need, and he would not receive any assistance.

I would say that every member has a moral obligation to carry out the objectives of the organization. I would expect a member to do everything he could to aid his own cause, which is the reason he is a member of the Union. He becomes a member of the Union to improve his wages and working conditions. I would assume he would do everything he could to further that end. The Union is a voluntary association of workers in a given establishment, and in the case of the Kohler workers when they voluntarily decided, by secret ballot, to go on strike, obviously, I would expect every member who made that decision to be bound by the democratic vote of the majority and try to further their cause.

I have not had a single instance brought to my attention where a striker was complained about for not participating in the activities. The whole purpose of the strike
42 is to deny the employer the benefit of the labor of the individual workers as a means of establishing economic pressure on the company to try to bring about economic justice at the bargaining table. That is the sole purpose of the strike.

The Union is the employees. In the case of Kohler, when you talk about the Union at Kohler, you are talking about the employees of the plant. They aren't two separate entities. The employees are the Union. So in this case when the Kohler workers make a decision that they are not satisfied with their wages and working conditions, and they desire to go on strike to deny the sale of their labor power to the employer, they are making a decision of trying to create economic pressure on the Company to bring economic justice to the bargaining table.

Each member of a Local Union, who holds his membership in a Local, is automatically a member of the International Union, which means all of the membership of all of the Locals put together. When you talk about the administratorship of these funds, they are administered at two levels: At my level where we make a decision on giving a Local Union a certain amount of money to meet the needs of the members on strike; and then the Local Union has the responsibility of actually doing the on-the-spot administratorship of actually carrying on interviews, signing the vouchers, preparing the checks, and doing this work. So it is a two-level administration. No strike funds can be disbursed to an applicant unless the Union authorizes the expenditure.

Mr. ATHERTON:

Q. Well, you wouldn't compare the Union to the Red Cross, would you?

A. In some respects we carry out the same functions as the Red Cross does. The Red Cross acts in emergencies, in national disasters and floods, and matters of that type.

43 Q. But your Union does—

A. I would like to answer your question. We, for example, gave \$250,000 to the victims of the Flint tornado; we gave \$100,000 to the victims of the flood in the State of Connecticut, so we are performing exactly the same services as Red Cross was performing.

Q. Is it not true you were not using strike funds for those purposes; you were using your welfare fund?

A. I believe in that particular case—we don't have a welfare funds as such. I believe in that particular case—we considered the emergency that the floods and the tornado brought about caused hardship to not only our members but to people in the communities in which these disasters took place—that we made this a special expenditure of our strike fund.

Q. Did you authorize a special invasion of the strike fund for that purpose?

A. We felt this was a national emergency that we ought to make a contribution to. If my memory serves me correctly, we did use strike funds for that purpose.

Q. How was that accomplished, by a vote of the membership or by action of the Executive Committee of the Union?

A. Under the structure of our Union the highest body of the Union is its conventions that are held every two years. Between conventions the Executive Board is the supreme body. Obviously, you can't get a million and a half members in a meeting, and the decision was made by the Executive Board.

Q. Was it subsequently approved by the members?

A. No. The Executive Board acts and functions for the members the same was as the Board of Directors of a corporation functions on behalf of its stockholders.

Q. But here you have a situation where you state that the Executive Board of the Union authorized disbursement
44 out of the general strike fund for purposes other than strike benefits.

A. Yes. I said the we considered this to be a national emergency that affected various communities around the country in which we had members, and in which there was distress.

and need, and that in this respect we functioned in exactly the same manner as the Red Cross did.

Q. And you also testified that the Union and the members of the Union are all one, there is no distinction between the two?

A. That's right.

Q. And yet you have testified that the Executive Board of the Union did not find it expedient or necessary, under the Constitution and By-Laws, to ask the approval of the entire membership of such action.

A. Well, let's be practical and reasonable. To begin with, it is impossible to have a referendum vote on a question of this type. When Congress passes some particular act, they don't ask all the citizens whether or not they are in favor of the act. They have delegated responsibility; and so do we in the Union. We have delegated responsibility in our Executive Board, and we have a democratic convention every two years in which we have an average of one delegate for every 400 dues-paying members to pass upon our actions. I make a financial report every six months to our members. My books are audited. I make a financial report to the convention of the Union, and the actions of the financial transactions of the Union are approved in an officers' report that is brought to the convention by rank and file committee, and therefore these actions have been approved. They were approved after the fact, however. It is impossible to ask members in advance of an event of this type for their approval.

45 Q. The so-called strike fund, is that a sinking fund, if you know what I mean? Is it taken out and actually deposited in a bank for that specific purpose and earmarked for that particular purpose, or is it merely a bookkeeping entry on your books allocating so much of the income of the Union to this purpose and something else?

A. We have a number of funds in the Union: We have a general fund, we have a strike fund, we have a citizenship fund, we have a fair practice anti-discrimination fund, we have a pension fund, we have an educational fund, and we have a recreational fund. All of these funds are earmarked under the provisions of the Constitution, and we set aside in the case of the strike fund 25 cents per month per member into a fund—into the strike fund. As far as banking accounts are concerned—I think that's the reference you had to the sinking fund—they are all part of two banking accounts: We have a

payroll account and we have a general banking account. But I do keep records to allocate these various funds, and I make reports to the Executive Board and to the membership on the status of the various funds.

Q. So, in other words, you do not deposit the strike fund in any particular banking account, earmarked as strike funds in a trustee account?

A. We don't have a separate account for the strike fund, no.

It was the policy of the Union in 1952 to require a striker to apply to welfare funds first. The position of our Union was that we pay taxes to the community agencies that make welfare funds available and at the time we felt that our members ought to use the services which they pay taxes for instead of drawing on the Union funds initially. That policy, however, has been changed. It is not necessary for a member of our Union now to go to a welfare agency and apply for assistance from the welfare agency before we give him strike assistance.

The policy in 1954 was to use community agencies but, as I testified previously, that in the case of the Kohler workers we waived that particular policy because, after checking with the Sheboygan Welfare Agency, we found that the Kohler workers were expected to give up their license plates and not use their automobiles, and restrictions were so great that we didn't think we ought to impose those restrictions on the Kohler workers.

At no time has it been our policy that our members had to go to the Community Chest Funds for assistance. But, in 1952 and 1954 at the time of the action we are talking about, the welfare agencies of the county which are maintained by taxpayers' money, it was our policy at that time that they had to exhaust that effort first before we gave them assistance. However, as I stated before, we waived it in the case of the Kohler situation. We actually save the Sheboygan taxpayers a lot of money by the assistance we gave the Kohler workers ourselves.

Redirect examination by Mr. RASKIN:

I am familiar with such organization as the St. Vincent de Paul Society, the Salvation Army. I am a member of the Executive Board of the Detroit Community Chest, and I have

been for a good many years—and I am familiar with 195 organizations in that community. I know that such agencies extend assistance to people who are in need.

We probably give the Kohler workers more assistance than they could get from the agencies that are maintained
47 by donations from the citizens in a given community.

We carry out the same function, for the purpose of the strike assistance program is to satisfy the needs of our members in food, clothing, and shelter, and any other needs that people have when they are unemployed. The Community Chest Agencies try to satisfy the same needs. They might also satisfy legal needs. They also maintain Legal Aid Bureaus as part of our Chest in Detroit. If a person needs an attorney, he might get assistance through monies that are set aside for that purpose.

I know that the Community Chest Agencies would grant relief and make payments to persons on strike. Before we had our current strike program, and did not have very much money in our fund, we used to get assistance from the Salvation Army groups and from various other groups of that type. We exhausted and used all the community agencies that we could, because we had no other source of meeting the emergency needs of our members that were brought about by the result of a strike.

HARVEY KITZMAN called as a witness on behalf of plaintiff.

Direct examination by Mr. RASKIN:

My name is Harvey Kitzman. I live at 2932 North Hackett Avenue in the city of Milwaukee; I am a Regional Director for United Auto Workers of Region 10, which covers the territory of six states—all of Wisconsin, Minnesota, North and South Dakota, Montana and Wyoming.

The function of the Regional Director is to service Local Unions on a day-by-day basis with their problems in the plant under the various agreements, along with helping them negotiate their agreements during the contract negotiating
48 time. For that purpose I have a staff where each staff member is assigned so many Local Unions that he services on a day-to-day basis. Local 833 is a part of Region 10 and my office rendered services to it through the staff members assigned to that Local.

The strike was not called by my office. That was done by the Local Union itself. My office participated in the negotiations. I, myself, spent 66 days at the bargaining table in that strike. That is more than you would spend in 10 Local Unions without getting any where. My office did not take an affirmative position in the calling of the strike. That was done by the Local Union. I did participate and asked the Local Union not to go on strike in March when the old contract expired—and advised them that we ought to try and see if we could work out an agreement. As a result, we kept on negotiating for a month and 5 days beyond the expiration—or cancellation of the contract. At that point the Local Union decided they weren't getting anywhere; they had to take some other action, and took strike action.

When a strike is called and the strikers find themselves in need whereby they have to have clothing, food—the Union makes an application to the Regional Office, pointing out that there is need here and asking for strike assistance. I signed this request and forwarded it to the International Union Headquarters. I do not lay down any conditions for the distribution of these funds. The only basis is the basis of need. You have families that probably through no fault of their own haven't been able to lay anything away, or they might have payments to make on their homes. They are out of work for two, three weeks, and in some instances immediately they find they can't meet their bills. They don't have food, groceries, milk for their children. If those are the facts, that certainly establishes the fact of need, and at that point we give
49 them assistance. Such assistance is given to people who are not on strike on various times by the Local Union.

The Union does give donations to people in need who are not on strike. I had this personal experience where a family, while they were away from home one afternoon, their home burned down. They lost everything they had, and in this case, the head of the family was a member of the Union. The Union went out and purchased a stove and the necessary furniture that they need so that they could at least setup house-keeping, which was an outright donation to them.

In the United States District Court

Instructions to jury

The COURT. Members of the Jury, this action is brought by the plaintiff against the United States of America to recover income taxes paid by him under protest. The plaintiff claims that the money in question or that the receipts in question—whether money or merchandise is immaterial—were not income but were, in fact, gifts.

You have heard the evidence and the contentions presented by the parties. The court will now submit the issue to you in a special verdict consisting of one question. This question you are to answer solely from the evidence received on this trial considered in the light of the instructions which I will now give you. It is your duty to answer this question on its own merits, uninfluenced by any thought or desire as to the final outcome of the case under the law as the court may be called upon to apply the law. In answering this question you are not to be moved by any feeling as to which party you would like to have win the lawsuit nor, by any motive other than that of trying to determine the actual truth with respect to the inquiry. You are not to understand by
50 the wording of the question that the court intimates any opinion as to how it should be answered. You must be governed by the evidence, according to the evidence such credibility as in your best judgment you believe it entitled to, and based on the evidence and these instructions you are to answer the question as you believe the facts to be.

The question reads as follows:

Were the amounts received by plaintiff, Allen Kaiser, from May 14th to December 31st, 1954, from United Automobile, Aircraft and Agricultural Implement Workers of America, a gift?

And that question you are to answer "yes" or "no" from the evidence and applying the instructions of the court.

The burden of proof as to this question is on the plaintiff. This means that it is the duty of the plaintiff to satisfy and convince your minds, by a clear preponderance of the credible evidence to a reasonable certainty, that this question should be answered "yes." If you are not so convinced, you will answer the question "no."

By "preponderance of the evidence" is meant the evidence which possesses the greater weight or convincing power. It is not enough that the evidence of the party upon whom the burden of proof rests is of slightly greater weight or convincing power; it must go further and satisfy or convince the minds of the jury before the burden of proof is discharged.

The convincing power of the evidence "is not necessarily determined by the number of witnesses. By a "preponderance of evidence" is meant a preponderance in the weight, credibility and convincing power of the evidence.

In connection with these definitions you are instructed that in determining the convincing power of evidence
51 you may take into consideration the knowledge or source of information of the several witnesses, their interest or lack of interest, their candor or lack of candor, the bias or lack of bias manifested by them, the manner of testifying and the bearing of the witnesses upon the witness stand, any contradictions or inconsistencies in their testimony, the probability or improbability of the statements or assertions made, and all the facts and circumstances that have been made to appear upon this trial.

If you find that any witness or witnesses have knowingly and wilfully testified falsely as to any material fact in the case, you are at liberty to disregard all of the testimony of such witness or witnesses not corroborated by other credible evidence in the case.

Now, Members of the Jury, you are not called upon to decide the wisdom of the tax laws. Tax laws are enacted by Congress. The American people vote for members of Congress and members of the Senate. Once the tax law is enacted it is your duty, under your oath as jurors and my duty under oath, to enforce the law as written. The wisdom or lack of wisdom is not for your consideration. Also, I am sure that you know, as all of us know, that the payment of taxes is in many cases a hardship—or at least the taxpayer thinks it is—and there are many things that we as American citizens could have if we didn't have to pay taxes. But we have to support a government if we are going to have one, and your government has certain functions, and those functions and the wisdom of the tax policy is for Congress and the Government, and it is up to us to enforce the law, whatever we find the fact to be in this case.

It is the contention of the plaintiff that the payments in question were a gift. It is the contention of the defendant that such payments were part of the gross income of the plaintiff for income tax purposes. "Gross Income" is defined in the statute, in so far as material to this case, as follows:

"GROSS INCOME DEFINED. General Definition. Except as otherwise provided in this sub-title, gross income means all income from whatever source derived, including (but not limited to) the following items:

"Compensation for services, including fees, commissions, and similar items.

"Gross income derived from business, from dividends, annuities, pensions, income from discharge of indebtedness, and distributive share of partnership gross income, among other items."

You will note that the definition is broad and states that "gross income" means all income from whatever source derived, including the items above enumerated, but that "gross income" is not limited to income or funds received from the items which I enumerated.

You are instructed that if these payments to the plaintiff were "gross income", then you should answer the submitted question "no".

This statute describes income taxed in sweeping terms and should be broadly construed in accordance with the obvious purpose to tax incomes comprehensively. Under this section, defining "gross income," a payment even though made entirely voluntarily, if it is compensation for services, is income. The absence or presence of consideration, in the legal sense, is not the controlling factor in cases involving the question of whether voluntary payment for services is compensation or income, but the sole question in that respect is the intention with which the payment was made.

The language used by Congress in this statute was so used to exert in the field of income tax the full measure of its taxing power. Congress applied no limits as to the source of taxable receipts, nor restrictive labels as to their nature.

To illustrate how broad the language of Congress was intended with reference to salaries, wages, or compensation for personal services, where a corporation made payments of stock

to an individual in return for the individual's promise not to enter into a certain business in competition, such payments are income. Compensation for refraining from labor is taxable income no less than compensation paid for services to be performed.

Whether the receipts were gifts is primarily a question of fact to be resolved under the peculiar circumstances of this case. In determining whether these payments were gifts, the intention with which the payments, however voluntary, were made, rather than the presence or absence of consideration therefor, controls. If it was the intention of the Union to pay for services, these payments are income; but if made to show good-will, esteem or kindness toward the plaintiff, without any thought of payment for services or without any consideration or obligation to make payment, then they were gifts. If these payments were made by the Union because of any obligation, either legal or moral, to make such payments under the provisions of its Constitution or under its organization or management, then the payments were not gifts and you should answer the question "no." You will note that this question should be answered "no" if the payments were made because of either a legal or moral obligation to make them.

In considering this question you will, among other things, consider the provisions of the Constitution of the Union with reference to strike benefits, as well as the other actions of the Union in respect to strike benefits.

54 In order to have a gift, there must have been a donative intent on the part of the Union. A claim that a payment is a gift presents a question as to whether the designation as such is genuine or fictitious; that is to say whether, though called a "gift," it is in reality income as defined to you heretofore.

To determine that question, you must consider all of the evidence received in the case. The fact that the motives leading to the payment may have been grounded on business reasons, or even selfishness, is not controlling. The question is, were the payments gratuitous? Were they intended to be gratuitous, without either legal or moral obligation to make the payments and without expecting anything in return?

The question here asked must be resolved under the peculiar circumstances of this case. The mere fact, if it be such, that the payments were voluntary does not, in and of itself,

establish them as gifts. If the payments were made as compensation for services, even though the Union did not consciously have that intent, they constitute taxable income and not gifts. The term "gift" as here used denotes the receipt of financial advantage gratuitously, without obligation to make the payment, either legal or moral, and without the payment being made as remuneration for something that the Union wished done or omitted by the plaintiff. To be a gift, the payments must have been made with the intent that there be nothing of value received, or that they were not made to repay what was plaintiff's due but were bestowed only because of personal regard or pity or from general motives of philanthropy or charity. If the plaintiff received this assistance simply and solely because he and his family were in actual need and not because of any obligations, as above referred to, or any expectation of anything in return, then such payments were gifts.

55 You are instructed that a Labor Union is a voluntary organization, but the members and the Union are distinct. The Union represents the common or group interests of its members as distinguished from their private or personal interests. Dues and assessments paid by members to the Union become the property of the Union, and any individual interest therein ceases upon such payment. As such Union property, such funds are subject to disbursement and expenditure by the Union in pursuance to the legal objectives for which they were designated to be expended. The collection, disbursement and expenditure of these funds is specifically set out and controlled by the Constitution and By-Laws of the Union.

I might state here, Members of the Jury, that when you pay taxes to the City of Milwaukee your individual interest in the tax money ceases, and the expenditure of that money is the duty and privilege of the Common Council so long as it stays within the provisions of law in making the payments. So here that might be illustrative. When this money is paid into the Union, then the individual interest of the members in the money they paid ceases in so far as control over its expenditure is concerned. That is controlled by the Constitution of the Union and the Union officers, and they, as members of the Union, would have about the same amount of control that you as taxpayers have as to what the City of Milwaukee does with its money. In other words, if you don't like what the

City's Common Council does you vote for a different Alderman next time. As long as the Common Council stays within the law, they control the payments.

It is your duty to scrutinize and weigh the evidence, both oral and written. As to the oral testimony, you should consider the manner and demeanor of the witnesses, their
56 interest or lack of interest in the result of the case, their opportunity to know the facts testified about, the reasonableness of the testimony given, and all other facts and circumstances which either support or discredit the testimony of each witness, and you should give it such weight and credit as you think it fairly entitled to receive. You are the sole judges of the credibility of the witnesses.

Now, there has been received in this case a stipulation setting forth facts agreed to by both parties. As I told you yesterday, the facts in that stipulation are binding on you. However, you may come to different conclusions from those facts.

In that stipulation, which you may have in your jury room, there is some underlining and large-face type. That is in there not to provide any emphasis, but because it is an exact copy of the documents which it purports to copy, and where in those documents bold face type is used, then bold face type is used in this stipulation so that it is exactly accurate in so far as they are quoted from.

Members of the Jury, I want to caution you that you are not to let any motive, other than finding the facts from the evidence, enter into or become any part of your deliberation. The question as to whether the Union or the Company is in the right or in the wrong, or partially so, in the Kohler strike is not before you. It has no bearing on the question here presented and, therefore, I again direct you to divorce from your minds and from your consideration any thoughts or ideas that you might have as to whether either side is right or wrong in that strike, and to decide this case without either sympathy for or prejudice against either the Union or the Company. Those questions or feelings have nothing to do with the problem before you, which is simply for you to determine
57 whether the payments in question were income tax purposes, or gifts.

If you are convinced to a reasonable certainty by a fair preponderance of the credible evidence that such payments were gifts and were not income as I defined income to you, then you

will answer the question in the verdict "yes." If you are not so convinced, you will answer it "no."

On retiring to the jury room, it is your duty to answer this question. As you take up this question, you are to decide what the evidence discloses under the rules of law as I have given them to you. You have taken your oath to decide this case upon the evidence and upon the law as given to you by the court. I am sure that you will conscientiously fulfill that duty. You must reach a unanimous verdict; that is, all twelve of you must agree on the answer to the question in the verdict.

You will select one of your members as foreman or forelady and he or she will preside over your deliberations and will sign the verdict which you agree upon.

In United States District Court—Eastern District of Wisconsin

(Caption—No. 56-C-162)

Special verdict—November 14, 1957

Were the payments made to plaintiff, Allen Kaiser, from May 14th to December 31st, 1954, by the United Automobile, Aircraft and Agricultural Implement Workers of America, a gift?

Answer: Yes.

Dated, Milwaukee, Wisconsin, this 14th day of November 1957.

(S) ADOLPH M. SCHLIWA
Foreman.

58 In United States District Court—Eastern District of Wisconsin

(Caption—No. 56-C-162)

** Opinion—February 19, 1958*

The case is before the court on the government's motion, under Rule 50(b), F.R.C.P., to set aside the verdict of the jury and the judgment entered thereon and to enter judgment in accordance with the government's previous motion for directed verdict; or, in the alternative, if the motion to set aside be denied, for a new trial.

The action was brought for refund of taxes allegedly erroneously collected. The only item in issue is an amount of \$565.54

received during 1954 by plaintiff as strike benefits from the United Automobile, Aircraft and Agricultural Implement Workers of America, hereinafter referred to as the U.A.W. If such amount constitutes a nontaxable gift, plaintiff is entitled to a refund. If it represents taxable income to the plaintiff, the tax in respect thereof was correctly collected and plaintiff can have no refund.

Counsel for both parties informed the court at the time of the pretrial conference that this was a case of first impression and that there were an unbelievable number of men who had paid a similar tax under protest where a similar situation existed and who were awaiting the outcome of the trial in this case. At the close of plaintiff's case, defendant moved for a directed verdict, and a similar motion was made at the close of all the evidence. On both occasions, the court denied the motion without prejudice. It was apparent that if this were to be a test case, it would be reviewed by appellate courts, regardless of its outcome, and the court felt that there
59 should be a complete record so that no new trial would be necessary if the appellate court reversed.

The issue was tried before a jury and a special verdict of one question was submitted:

"Were the amounts received by plaintiff, Allen Kaiser, from May 14th to December 31st, 1954, from United Automobile, Aircraft and Agricultural Implement Workers of America, a gift?"

To this question the jury answered "yes". Judgment for plaintiff was entered on the verdict; Rule 58 F.R.C.P.

Stipulations filed with the court before trial set forth the following facts: At the time he paid the tax in question, Allen Kaiser was a resident of Sheboygan, Wisconsin, and in 1954 and prior thereto was an employee of the Kohler Company at Sheboygan, Wisconsin. On March 4, 1954, a strike against the Kohler Company was authorized by the members of Local Union 833, approved by the U.A.W., which strike became effective on April 5, 1954. Kaiser was not present at the meeting of the Union when the strike vote was taken. He did not become a member of the Union until August 19, 1954. The decision to become a member of the Union was voluntarily arrived at by Kaiser. He was on strike at the time he was admitted to membership in the Union. He did not pay any initiation fee or dues because he was on strike.

Beginning with May 4, 1954, before he was a member of the Union, Kaiser received strike benefit payments from the U.A.W. It granted strike benefits to non-members who participated in the strike if they did not have sufficient income to purchase food or to meet the emergency situation. The Union treated non-members on the same basis as members, but non-members, as well, as members, had to be strikers before they could receive assistance from the Union. A distinction was made by the Union between applicants in granting strike benefits to them, depending upon their marital status and number of dependents.

At the time of the declaration of the Kohler strike the U.A.W. had \$9,141,488.00 in its strike fund, and Local Union 833 had in its strike fund \$63,677.88, which latter amount was transferred to the U.A.W. in 1954 and was set up in a special bank account to deal with strike expenditures and strike needs of Kohler workers.

The Constitution of the U.A.W. contained the following provisions:

"Article 12, Section 1. The International Executive Board shall execute the instructions of the International Convention and shall be the highest authority of the International Union between Conventions, subject to the provisions of this Constitution, and shall have the power to authorize strikes, issue charters and punish all subordinate bodies for violation of this Constitution.

"Article 12, Section 15. If and when a strike has been approved by the International Executive Board it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union.

"Article 16, Section 4. * * * Five cents (.05) of each month's dues payment must be laid aside by the Local Union as a special fund to be used in case of strike or lockout. * * *

"Article 16, Section 11. All Local Unions shall pay to the International Union a per capita tax of one dollar and twenty-five cents (\$1.25) per month per dues-paying member, twenty-five cents (.25) of which shall be set aside in a special fund as the Inter-

national Union Strike Fund, to be drawn upon exclusively for the purpose of aiding Local Unions engaged in authorized strikes and in cases of lockout, and for that purpose only, and then only upon a two-thirds vote of the International Executive Board. * * *

"Article 16, Section 13. All per capita taxes and all other monies collected for the International Union shall be transmitted to the International Secretary-Treasurer by the twentieth of each month following collection. All such per capita taxes and other monies are strictly the property of the International Union and in no case shall any part thereof be used by Local Unions, except upon permission of the International Executive Board.

"Article 49, Section I. * * * If, as a result of this decision, a strike vote is decided upon, the Local Union Executive Board shall notify all members, and it shall require a two-thirds vote by secret ballot of those voting to declare a strike. Only members in good standing shall be entitled to vote on the question of declaring a strike.

"Article 49, Section 5. Before a strike shall be called off, a special meeting of the Local Union shall be called for that purpose, and it shall require a majority vote by secret ballot of all members present to decide the question either way. Wherever the International Executive Board decides that it is unwise to longer continue an existing strike, it will order all members of Local Unions who have ceased work in connection therewith to resume work and thereupon and thereafter all assistance from the International Union shall cease.

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"Article 49, Section 6. Any Local Union engaging in a strike which is called in violation of this Constitution and without authorization of the International President and/or the International Executive Board shall have no claim for financial or organizational assistance from the International Union or any affiliated Local Union."

The testimony at trial showed that strikers were not required to serve on the picket lines, help in the soup kitchen, or render like services in order to receive strike benefits. They were encouraged to do so and were regarded by the Union as having a moral obligation to do so. The amount of \$565.54

received by Kaiser as strike benefits was in the form of food, clothing, and payments by the Union on his room rent.

There was testimony that on occasion the Union had used money from this strike fund for flood relief and other charitable purposes. This usage is directly contrary to the express provisions of Article 16, Section 11 of the Constitution of the International Union quoted above.

Two of the arguments advanced by the government in support of its motion for a new trial have little weight: First, it is alleged that error was committed because the court did not specifically ask the jury, in the verdict, whether the Union intended to make a gift of the \$565.54 to Kaiser. Accordingly, objection is made to the verdict used by the court which asked only whether the amounts received by Kaiser were a gift. To this point it is but necessary to answer that the proposed verdict submitted by the government to the court on the morning of trial consisted of a single question which asked whether "the sum * * * received by [Kaiser] from the Union * * * was a gift;" to point out that the government itself proposed an alteration in the verdict which was actually used and
63 expressed satisfaction in the final form of the verdict when the court accepted the alteration; and to note that at no time did the government request the court to submit a separate question on the specific item of intent. The court is satisfied that the verdict used was the proper one for this case. The matter of intention of the Union was thoroughly covered in the instructions to the jury.

The government also claims that the court's instructions were erroneous in that they included an instruction to the effect that the absence or presence of consideration in the legal sense is not the controlling factor in cases involving the question whether voluntary payment for services is compensation or income, but the sole question in that respect is the intention with which the payment was made. Also claimed to be erroneous is that part of the instructions which stated that whether the receipts were gifts is primarily a question of fact to be resolved under the peculiar circumstances of this case, and that in determining whether the payments were gifts, the intention with which the payments, however voluntary, were made, rather than the presence or absence of consideration therefor, controls. To these objections it may be answered that when the context is considered it is clear that the court was not instructing the jury to disregard the presence of legal

consideration, if it found such to exist, but rather the court, in accordance with the law, was instructing the jury that a voluntary payment made without the presence of legal consideration may nonetheless be taxable income rather than a gift if the intent of the payor was to confer a reward for some service or benefit to him. Such an instruction was clearly to the benefit of the government. Examination of the instructions as a whole reveals that the court repeatedly instructed the jury that if the payments were made by the Union in exchange or return for something the Union wanted from Kaiser, the jury must find the \$565.54 to be taxable income. The court told the jury that before it could find the strike benefits to be a gift, it must find that the amount was not paid—

As compensation for refraining from labor. (Tr. 141)

Under any legal or moral obligation. (Tr. 142)

As compensation for services. (Tr. 143)

As a remuneration for something the Union wanted done or omitted. (Tr. 143)

As anything due to the plaintiff. (Tr. 143)

In expectation of any return. (Tr. 143)

However, the government's motion is more soundly based, insofar as it rests on the contention that under the evidence of the case, "viewing the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to plaintiff" [Shaw v. Hines Lumber Co., (C.A. 7, 1957) 240 F. 2d 434, 439], as a matter of law the strike benefits constituted taxable income and not a gift.

The evidence in this case is not disputed. The question basically is one of interpretation of the statutes. Findings are held to be subject to review on this question. *Bogardus v. Commissioner*, (1937) 302 U.S. 34, 38-39, 58 S.Ct. 61, 82 L.Ed. 32; *Willkie v. Commissioner*, (C.C.A. 6, 1942) 127 F. 2d 953, 955; cert. den. 317 U.S. 659, 63 S.Ct. 58, 87 L.Ed 530.

The 1954 Code sections applicable to the question are sections 61(a) and 102(a). Section 61(a) defines gross income as "all income from whatever source derived." Section 102(a) provides that "gross income does not include the value of property acquired by gift * * *". Thus, gross in-

come is defined in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively.¹ The definition is very comprehensive,² intended to be far-reaching, and indicates the purpose of Congress to use the full measure of its taxing power.³ Construction should be liberal and consonant with that purpose. On the other hand, provisions granting exemption from tax, such as 102(a), are to be construed strictly and with restraint.⁴ Words of exemption or exclusion are not to be extended beyond their plain meaning,⁵ and exemptions cannot rest upon implication.⁶ Specifically, section 102(a), exempting gifts from income tax, should not be construed liberally in favor of one claiming the exemption, but rather in such way as to give section 61(a) its proper effect.

As previously indicated, the material facts in this case are all either stipulated or supported by uncontroverted testimony. It is not disputed that the strike benefits were paid by the International Union on the basis of need and irrespective of membership in the Union. These facts, standing alone, indicate a gift. But it is also undisputed that the strike was being conducted with the approval of the International Executive Board, that Article 12, Section 15 of the International Union Constitution made it "the *duty* of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union" [emphasis supplied], and that it was required of every person to whom benefits were paid that he join the strike and continue to remain on strike. If plaintiff had been a member of the Union before the strike and

66 had paid his dues, deductible by him and not taxable as income to the Union, he would certainly have had a moral right to strike benefits and might well have been able to enforce that right if the Union arbitrarily denied benefits to him. In such a case an even more clear-cut question would be presented.

A gift, within the meaning of section 102(a), is the receipt of financial advantages gratuitously,⁷ is made from a detached and disinterested generosity,⁸ without the incentive of anticipated benefit of any kind beyond satisfaction of doing a generous act,⁹ without consideration,¹⁰ for that only is a gift which is purely such,¹¹ without the compulsion of moral or legal duty,¹² and is basically something for nothing.¹³ The voluntary character of the payment is not determinative, for a pay-

ment may constitute income to the recipient though made to him without legal obligation."

Applying these rules of law and construction to the undisputed evidentiary facts, it is the opinion of this court that as a matter of law the payments to Kaiser constituted income taxable to him and cannot be brought within the gift exclusion. The payments were made to its members by the International Union under a moral obligation imposed by its Constitution. They were made to all strikers pursuant to a plan whereby something of value to the Union was exacted in return from the recipient, namely, his continued participation in the strike. Either reason is sufficient to prevent the payments from being a gift.

This conclusion is also demanded by the administrative treatment of strike benefits. In 1920, by O.D. 552, C.B. No. 2, p. 73, Internal Revenue issued and promulgated a ruling which dealt with the point in issue in this case:

"Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received, there being no provision of law exempting such income from taxation."

67 For thirty-eight years, except as reaffirmed by Rev. Rul. 57-1, I.R.B. 1957-1, 10, this ruling has remained unchanged through repeated Congressional re-enactments of the relevant income tax sections (now 61(a) and 102(a) of the 1954 Code).¹⁵ Thus, the administrative interpretation and practice must be said to have always been seasoned and settled, uniform and consistent. Considering the length of time the unvaried ruling and practice has been in effect, the non-technical nature of the question, and the importance of the issue in both the tax and labor fields, it must be concluded that Congress was aware of the administrative interpretation when it repeatedly re-enacted the sections. Under such circumstances, the administrative interpretation is not only entitled to great weight, but must be held to have received Congressional approval and to have assumed the force and effect of law. *Corn Products Co. v. Commissioner*, (1955) 350 U.S. 46, 52-53, 76 S. Ct. 20, 100 L. Ed. 29; reh. den. 350 U.S. 943, 76 S. Ct. 297, 100 L. Ed. 823; *United States v. Leslie Salt Co.*, (1955) 350 U.S. 383, 389, 76 S. Ct. 416, 100 L. Ed. 441; *Commissioner v. South Texas Lumber Co.*, (1948)

333 U.S. 496, 501, 68 S. Ct. 695, 92 L. Ed. 831; reh. den. 334 U.S. 813, 68 S. Ct. 1014, 92 L. Ed. 1744; *Crane v. Commissioner* (1947) 331 U.S. 1, 7-8, 67 S. Ct. 1047, 91 L. Ed. 1301; *Commissioner v. Flowers*, (1946) 326 U.S. 465, 469, 66 S. Ct. 250, 90 L. Ed. 203; *Boehm v. Commissioner*, (1945) 326 U.S. 287, 291-292, 66 S. Ct. 120, 90 L. Ed. 78; *White v. United States*, (1938) 305 U.S. 281, 291, 59 S. Ct. 179, 83 L. Ed. 172; *Helvering v. Winnmill*, (1938) 305 U.S. 79, 83, 59 S. Ct. 45, 83 L. Ed. 52; *Zillmer v. United States*, (C.A. 7, 1956) 233 F. 2d 912, 914; *Parker Pen Co. v. O'Day*, (C.A. 7, 1956) 234 F. 2d 607, 609-610; *Gunn v. Dallman*, (C.A. 7, 1948) 171 F. 2d 36, 38; cert. den. 336 U.S. 937, 69 S. Ct. 747, 93 L. Ed. 1095.

68 Nor is a distinction to be made, looking to this early administrative ruling, between strike benefit payments to members and, as occasionally happens, to non-members. As pointed out, in neither case can the payments be gifts.

" * * * The determination that strike benefit payments are includible in gross income is not affected by * * * the fact that such payments or distributions are also made to persons who are not members of the union. * * * " Rev. Rul. 57-1, I.R.B. 1957-1, 10.

The court is aware of the line of decisions holding that when the Internal Revenue Service makes a ruling on an obscure question, on a question that does not recur repeatedly, where a construction is neither uniform, general, nor of long standing, it is not entitled to substantial weight. The basis of that rule is that it is not to be presumed that Congress follows all the rulings of the Internal Revenue Service. This case involves a situation where a ruling is not only of long standing but concerns, and has over the years, thousands and thousands of men. It is a matter of great public interest. The court is of the opinion that it falls within the type situation where repeated congressional re-enactments of the tax sections, without change, should be held to be an acquiescence in the administrative interpretation and practice.

One would also be loathe to believe that Congress intended that each one of these cases, of which there are thousands, should be tried as a question of fact. If such were the situation, the results would not be uniform, the cost would be prohibitive both to the taxpayer and the government, court calendars would be flooded with these cases, the government

would have to vastly increase its staff of attorneys, and chaos and inequities would be the result. The court believes that if such a situation is to be brought about, it should be brought about by Congress. It is inconceivable that Congress did not intend the law to be uniform.

There is no ground for believing that it has suddenly become the intent of Congress, without any official act or indication, to reverse the situation that has existed for almost forty years and now treat strike benefits as tax-free gifts. It is not the province of the courts to legislate in tax matters either directly, by their own pronouncements, or indirectly, but equally effectively, by allowing jury verdicts to stand which are contrary to law. To do is to pervert the judicial power. *Heiner v. Donnan* (1932) 285 U.S. 312, 331, 52 S. Ct. 358, 76 L. Ed. 772.

For the foregoing reasons, the court believes that no jury issue was presented and that the government was entitled to have its motion for directed verdict granted.

Counsel for the United States are directed to prepare an appropriate order, submitting it to counsel for the plaintiff for approval as to form only.

Dated, Milwaukee, Wisconsin, this 19th day of February 1958.

K. P. GRUBB,
U.S. District Judge.

FOOTNOTES TO OPINION

¹ *Commissioner v. Jacobson* (1940) 336 U.S. 28, 48-49 69 S. Ct. 358, 93 L. Ed. 477.

² *Commissioner v. Lo Bue* (1936) 351 U.S. 243, 246-247, 76 S. Ct. 809, 100 L. Ed. 1112; reh. den. 352 U.S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69.

³ *Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 429-430, 75 S. Ct. 473, 60 L. Ed. 483; reh. den. 349 U.S. 925, 75 S. Ct. 657, 90 L. Ed. 1256; *Helvering v. Clifford* (1940) 309 U.S. 331, 334, 60 S. Ct. 534, 84 L. Ed. 788.

⁴ *Commissioner v. Jacobson*, *supra* n. 1, 336 U.S. 48-49.

⁵ *Helvering v. American Dental Co.* (1942) 318 U.S. 322, 329, 63 S. Ct. 577, 67 L. Ed. 785.

⁶ *U.S. Trust Co. v. Helvering* (1939) 327 U.S. 57, 60, 50 S. Ct. 662, 83 L. Ed. 1104.

⁷ *Helvering v. American Dental Co.*, *supra* n. 5, 318 U.S. 329; *United States v. Burdick* (C. A. 3, 1954) 214 F. 2d 768, 771.

⁸ *Commissioner v. Lo Bue*, *supra*, n. 2, 351 U.S. 246-247.

⁹ *Bogardus v. Commissioner* (1937) 302 U.S. 34, 41, 58 S. Ct. 61, 82 L. Ed. 32.

¹⁰ Webber v. Commissioner (C.A. 10, 1955), 219 F. 2d 834, 836; Noel v. Parrott (C.C.A. 4, 1926) 15 F. 2d 600, 671; cert. den. 273 U.S. 754, 47 S. Ct. 457, 71 L. Ed. 875; Schumacher v. United States (Ct. Cl., 1932) 55 F. 2d 1007, 1011.

¹¹ Bass v. Hawley (C.C.A. 5, 1933) 62 F. 2d 721, 723.

¹² Bogardus v. Commissioner, supra n. 9, 302 U.S. 41.

¹³ Commissioner v. Lo Bue, supra n. 2, 351 U.S. 247; Commissioner v. Jacobson, supra n. 1, 336 U.S. 50; Helvering v. American Dental Co., supra n. 5, 318 U.S. 331.

¹⁴ Old Colony Trust Co. v. Commissioner (1929) 279 U.S. 716, 730, 49 S. Ct. 400, 73 L. Ed. 918; United States v. Burdick, supra n. 7, 214 F. 2d 771.

¹⁵ Commissioner v. Jacobson, supra n. 1, 336 U.S. 48-49.

In United States District Court For the Eastern District of Wisconsin

(Caption—No. 56 C 162)

Order—March 12, 1958

This cause coming on to be heard upon a motion of the defendant for judgment in accordance with defendant's motion for directed verdict, or in the alternative, for a new trial, and the Court having considered each of the motions,

It Is Ordered: That the motion of the defendant to set aside the verdict and the judgment entered thereon for the plaintiff, and for judgment for the defendant notwithstanding the verdict in accordance with defendant's motion for a directed verdict is granted, and judgment for the defendant may be entered accordingly; and

It Is Further Ordered: That defendant's alternative motion for a new trial is denied.

Dated at Milwaukee, Wisconsin, this 12th day of March, 1958.

(S) K. P. GRUBB,
United States District Judge.

Approved as to form only;

(S) Max Raskin
MAX RASKIN,
Attorney for Plaintiff.

In United States District Court for the Eastern District of
Wisconsin

Caption—No. 56 C 162

Judgment for Defendant—March 28, 1958

This cause came on for trial before the Court and a jury on the 14th day of November, 1957, both parties appearing by counsel, and the Court on motion of the Defendant having set aside the verdict for the plaintiff and the judgment entered thereon, and having granted defendant's motion for a directed verdict in its favor,

It Is Hereby Ordered, Adjudged And Decreed that plaintiff take nothing; that the action be and it is hereby dismissed on the merits; and that defendant have and recover from plaintiff its costs in the action.

72 Dated at Milwaukee, Wisconsin, this 28th day of
March, 1958.

K. P. GRUBB,

United States District Judge.

In United States District Court for the Eastern District of
Wisconsin.

Caption—No. 56 C 162

Notice of Appeal

Notice Is Hereby Given that Allen Kaiser, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order setting aside the verdict and the judgment entered thereon for the plaintiff and from judgment for the defendant notwithstanding the verdict, entered in this action entered on the 12th day of March, 1958.

(S) Max Raskin
MAX RASKIN.

Max Raskin, Attorney for Appellant, 606 West Wisconsin Avenue, Suite 1885, Wisconsin Tower, Milwaukee, Wisconsin.

73 In the United States Court of Appeals for the Seventh Circuit

Appendix to Appellee's Brief

TRANSCRIPT OF PROCEEDINGS ON NOVEMBER 12, 1957

[Tr. 105] Mr. ATHERTON. Now, may it please the court, the Government has no affirmative evidence to put in. We rest on the stipulation that has been submitted to the jury and on the direct testimony and cross-examination. * * *

[Tr. 119, Plaintiff's closing address to the jury]:

Mr. RASKIN. * * * The decision was that sacrifices were necessary and essential to his own dignity. However, some time in the month of August of 1954 he decided to become a member of the union, and again, as was testified to—and, by the way, all of the testimony in this case, you probably will not have the good fortune of sitting as jurors in another case where none of the testimony is controverted. All of it is admitted. No one has challenged the Government, the Internal Revenue Department has not challenged a single phrase, a single word, a single sentence of any of our witnesses. They are the truth, and you can't challenge the truth; and the Tax Department realizes it. * * *

DEPOSITION OF EMIL MAZEY

[P. 2] Q. I will ask you to state your name, please.

A. My name is Emil Mazey. * * *

Q. What position do you occupy in the International UAW-CIO?

A. I am a Secretary-Treasurer of the International Union.

[P. 21] A. Well, I wish I could answer your first question. The aid will continue as long as the strike lasts. The aid has continued from about the beginning of the third week of the strike up until the present time, for a good many of the Kohler workers who had been on strike for a little over three years.

74 Q. That has been a substantial drain on the resources of the International Union?

A. It has. We have spent in excess of nine million dollars in strike aid to the Kohler workers.

Q. When a strike is called by the Union, what are the members of the Union expected to do?

A. Well, they are expected to prosecute the strike successfully.

Q. How are they expected to do that?

A. Well, the members have a moral obligation to picket, to work in the soup kitchen and to perform work as counsellors. They have a moral responsibility, but not a mandatory responsibility. * * *

[Pp. 31-32] Q. If a member of the Union is required by the employer to cut his work week below the normal work week period, for any length of time, does the Union make any benefit payments?

A. Absolutely not. Our finances are not in a position to aid members in that category. We have about fifty or sixty thousand unemployed members at the present time. I am sure some of them have exhausted their unemployment compensation, and it would be impossible, physically impossible for us to aid any of them. There isn't that kind of money in the Union treasury. * * *

75

In the United States Court of Appeals
For the Seventh Circuit

No. 12317. SEPTEMBER TERM AND SESSION, 1958

ALLEN KAISER, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN.

Opinion—December 22, 1958

Before DUFFY, Chief Judge, and MAJOR and KNOCH, Circuit Judges.

DUFFY, Chief Judge. This is a suit to recover an alleged overpayment of income taxes for the year 1954. The question presented is whether strike benefits received from a union by a worker while on strike is taxable income or, in the alterna-

tive, gifts which are exempt from income tax. The jury in the District Court found the strike benefits received by plaintiff were gifts. Subsequently, the trial court set aside the verdict of the jury and entered a judgment for the defendant dismissing the complaint herein.

On April 5, 1954, plaintiff Allen Kaiser was an employee of Kohler Company of Kohler, Wisconsin. On and before said date, Local 833 UAW, an affiliate of the International Union UAW, was the certified collective bargaining agent for the production and maintenance workers employed by Kohler Company. Not all of such employees were members of the Union.

76 On April 5, 1954, in concert with other employees, plaintiff Kaiser went out on strike. On that date he was not a member of the Union and did not apply for membership until August 19, 1954. During the strike he did not receive any benefits in cash, but commencing May 4, 1954, he received from the Union maintenance assistance in the form of food, clothing and payments of rent on the house which he occupied with his wife and two children. The funds from which the strike benefits were distributed were derived from the local Union, the International Union, and contributions from other unions, organizations and individuals.

On April 15, 1955, Kaiser filed with the Director of Internal Revenue for the District of Wisconsin, an income tax return showing wages received in the year 1954 in the amount of \$2,669.48 with a tax liability of \$359.00. As wages withheld totaled \$388.84, he claimed a refund. On February 17, 1956, the Director, by audit, increased the adjusted gross income by adding \$565.54, the value of the maintenance assistance received by plaintiff. This resulted in a tax of \$467. The plaintiff paid the sum of \$108.00 as additional tax plus interest, and sued for a refund.

The basic condition for receiving strike assistance was the actual present need of the individual worker. By questionnaire, it was determined whether he needed food, clothing and shelter. Such assistance was not a matter of a right like unemployment compensation. When plaintiff received his assistance, he neither gave nor promised anything in return. He was not required to render any service to the Union.

The learned trial judge apparently assumed that strike benefits constitute taxable income unless they are excepted as gifts. He relied on the broad scope of the definition in Sec.

61(a) of the Internal Revenue Code of 1954 that "gross income means all income from whatever source derived." However, the Commissioner has long acknowledged that the concept of taxable income does not include all receipts even though such receipts were not specifically excepted from taxable income by statute. The Commissioner has ruled that income did not include damages for alienation of affections,¹ damages for breach of promise to marry,² an award under a wrongful death statute,³ and payments to war prisoners for mistreatment by their captors.⁴ Despite the absence of express statutory authority, the Commissioner has refused to subject to income tax the receipt of retirement benefits paid under the Federal Old Age and Survivors Insurance System,⁵ unemployment compensation benefits paid by a state,⁶ and public assistance relief payments.⁷

Public assistance benefits which have been ruled not to be taxable also provide an analogy to strike benefits. Both provide relief to the indigent. Strike benefits are intended to prevent want as are public assistance benefits.

In 1952, the Commissioner ruled that receipt of food and medical supplies and other forms of subsistence from the American Red Cross by a disaster victim did not represent taxable income.⁸ About a year later, the Commissioner ruled that rehabilitation payments made to victims of a tornado disaster from a special fund set up by a large employer in the area for the benefit of his employees and their families "do not come within the concept of gross income under the provisions of § 22(a) of the [1939] Code."⁹ The Commissioner emphasized that the contributions were measured solely by need.

We hold that the strike benefits received by plaintiff under the facts of this case are not taxable income. The question as to whether such benefits received under other circumstances might constitute taxable income is, of course, not presented on this record.

¹ I.T. 1804, II-2 Cum. Bull. 61 (1923)

² G.C.M. 4363, VII-2 Cum. Bul. 185 (1928)

³ See I.T. 2420, VII-2 Cum. Bull. 123 (1928)

⁴ Rev. Rul. 55-132, 1955-1 Cum. Bull. 213

⁵ I.T. 3447, 1941-1 Cum. Bull. 191

⁶ I.T. 3230, 1933-2 Cum. Bull. 136

⁷ Rev. Rul. 57-102, 1957-1, Cum. Bull. 26

⁸ Spec. Rul. of I.R.S., 5 Stan. Fed. Tax. Rep. § 6196

⁹ Rev. Rul. 131, 1933-2 Cum. Bull. 112

In any event, the strike benefits received by plaintiff were gifts which are expressly excepted from taxable income by § 102, Internal Revenue Code of 1954. There is substantial evidence in this record to sustain the finding of the jury.

78 In *United States v. Burdick*, 3 Cir., 214 F. 2d 768, 771, the Court said: "As we held in *Smith v. Manning*, 1951, 189 F. 2d 348 whether the receipts are gifts is primarily a question of fact * * *"

The trial court adequately submitted the question of gift to the jury. Excerpts from the court's instructions are as follows:

"Compensation for refraining from labor is taxable income * * *";

"If it was the intention of the Union to pay for services, these payments are income";

"If these payments were made by the Union because of any obligation, either legal or moral * * * then the payments were not gifts and you should answer the question 'no'";

"If the payments were made as compensation for services, even though the Union did not consciously have that intent, they constitute income and not gifts."

After listening to and considering these instructions, the jury found that the strike benefits received by plaintiff were gifts.

In overruling and setting aside the verdict of the jury, the trial court was of the view that the strike benefits were made available to plaintiff pursuant to a moral obligation of the International Union to its members. However, the Union surely did not owe an obligation to plaintiff. He was not a member of the Union for four and a half months after the strike began, and yet he received strike benefits. Furthermore, there was testimony which the jury was entitled to believe that it was discretionary with the Union whether any strike benefits were to be distributed.

The second basis for the District Court's decision was that the Union exacted continued participation by plaintiff in the strike in return for receiving strike benefits. In other words, the Union, by giving plaintiff strike benefits valued at about \$17 per week, for a period of eight months, has exacted from plaintiff his continued participation in the strike and abstaining from work which previously netted him \$166 a week.

The answer to this contention is that if plaintiff, while remaining on strike at Kohler, had found temporary employ-

ment elsewhere, his strike benefits would have ceased.
79 The same would have been true if members of his family had found employment, because the basic condition of receiving benefits was the present need of the plaintiff.

It seems clear that the strike benefits which were paid plaintiff were completely unrelated to his former earnings. The factor determining the amount of benefits paid to him was his personal need, his marital status and the number of dependents. The benefits were given because he and his family were in need after he ceased working. Such payments were consistent only with charity. We hold they were gifts and were not taxable.

The District Court placed reliance on O.D. 552, 2 Cum. Bull. 73 (1920) in which the Commissioner ruled that "Benefits received from a labor union by an individual *member* [emphasis supplied] while on strike are to be included in his gross income * * *." Although little if any attention seems to have been given to this obscure ruling from 1920 to 1957, the learned trial judge stated it must be held to have received Congressional approval and to have assumed the force and effect of law.

This 1920 ruling did not cover strike benefits paid by a union to non-members or to a situation where a union paid strike benefits to both members and non-members alike. In any event, the so-called reenactment doctrine is more properly applied to regulations, which have the force of law, than to rulings.¹⁰ It has been said the rules have "no more binding or legal force than the opinion of any other lawyer."¹¹

Significant also on the weight to be given to this 1920 ruling is the statement of the Supreme Court in the late case of Commissioner v. Glenshaw Glass Company, 348 U.S. 426, 431

"* * * Re-enactment—particularly without the slightest affirmative indication that Congress ever had the Highland Farms decision before it—is an unreliable indicium at best. * * *

This statement is particularly appropriate here, as the Government has made no showing that the 1920 rule was even considered by Congress.

¹⁰ Bartels v. Birmingham, 332 U.S. 126, 132.

¹¹ United States v. Bennett, 5 Cir., 186 F.2d 407, 410.

Reversed.

80 KNOCH, *Circuit Judge*, dissenting. As indicated in the opinion of Chief Judge Duffy, the sole question here presented is whether strike benefits received from a union by a striking worker are taxable income to him.

Chief Judge Duffy concludes that the benefits received are nontaxable gifts. After careful consideration of the case, I regretfully find myself unable to agree.

It is true that the plaintiff, a non-member of the Union, was given strike benefits only after he had shown himself to be in need of food, clothing and shelter. The amount of aid given was based, not on his former earnings, but on his personal need, marital status and number of dependents. Such benefits would not have been given, or would have terminated, regardless of his continued participation in the strike, had his need ceased to exist through receipt of income from any other source by him or a member of his family.

However, his need was a secondary qualification to which consideration was given only after he had met the primary qualification: participation in the strike. Had he not met that primary qualification, he would have received no benefits. Had he ceased to meet that primary qualification, his benefits would have terminated notwithstanding the extent of his personal need, or whether he was a member of the Union or not. The fact that these benefits were paid to members and non-members alike emphasizes the real reason for payment, namely, either class must be in necessitous circumstances, but, above all, must be on strike.

The District Court clearly indicated that the case was allowed to go to the jury only to present a full record on appeal.

Determination of the character of the strike benefits presented a question of law. All the facts, including the Union's motivation and intent, were fully disclosed by stipulation of facts and uncontroverted testimony. *Bogardus v. Commissioner*, (1937) 302 U.S. 34, 58 S.C. 61, 82 L. Ed. 32; *Old Colony Trust Co. v. Commissioner*, (1928) 279 U.S. 716, 49 S.C. 499, 73 L. Ed. 918.

The Union did require consideration for the strike benefits bestowed on plaintiff. It was stipulated by the parties:

81 "The International Union grants strike benefits to non-members of the Union, who participate in a strike, if they do not have sufficient income to pur-

chase food or to meet an emergency situation. The Union treats such non-members on the same basis as members of the Union, but non-members as well as members must be strikers before they may receive assistance from the Union."

The Court instructed the jury that compensation for refraining from labor is taxable income. The majority opinion holds that this was a question to be resolved by the jury. In the light of the stipulated facts it is my opinion that there was a question of law only, and that no factual issue remained to be presented to the jury.

I would affirm the District Judge's ruling that "viewing the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to plaintiff" (citing cases) as a matter of law the strike benefits constituted taxable income and not a gift."

The District Court inferred Congressional approval from repeated re-enactment of the applicable sections of the Code, in the light of the 1920 ruling (described in the majority opinion) and 38 years of consistent administrative interpretation and practice. As many persons who have paid a similar tax are said to be awaiting the outcome of this cause, a policy question exists as to the advisability of making strike benefits tax free.

This dissent having been predicated on a totally different ground, however, these matters are not reached.

82 In United States Court of Appeals for the
Seventh Circuit

Before Hon. F. RYAN DUFFY, *Chief Judge*, Hon. J. EARL MAJOR, *Circuit Judge*, Hon. WIN G. KNOCH, *Circuit Judge*.

No. 12317

ALLEN KAISER, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WISCONSIN

Judgment—December 22, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern

District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, in accordance with the opinion of this Court filed this day.

83 Clerk's certificate to foregoing transcript omitted in printing.

84 Supreme Court of the United States

[Title omitted.]

*Order extending time to file petition for writ of certiorari—
March 19, 1959*

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

April 21st, 1959.

HUGO L. BLACK,
Associate Justice of the
Supreme Court of the United States.

Dated this 19th day of March 1959.

85 Supreme Court of the United States

[Title omitted.]

Order allowing certiorari June 1, 1959

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

APR 21

JAMES R. BROWNING

No.  55

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN KAISER

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

J. LEE RANKIN,

Solicitor General,

CHARLES K. RICE,

Assistant Attorney General,

Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. _____

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN KAISER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (Appendix C, *infra*, pp. 20-32) is reported at 158 F. Supp. 865. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 11-19) is reported at 262 F. 2d 367.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1958 (Appendix B, *infra*, p. 19). On March 19, 1959, by order of Mr. Justice Black, the time within which to petition for certiorari was ex-

tended to and including April 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether strike benefits received from a union by a worker while on strike are taxable income under the Internal Revenue Code of 1954.

STATUTE AND RULINGS INVOLVED

The statutory provision involved is Section 61(a) of the Internal Revenue Code of 1954. That section, together with O.D. 552, 2 Cum. Bull. 73 (1920) and Rev. Rul. 57-1, 1957—1 Cum. Bull. 15, are set forth in Appendix D, *infra*, pp. 34-37:

STATEMENT

During the year 1954, Allen Kaiser (taxpayer) was an employee of the Kohler Company of Kohler, Wisconsin. On March 4, 1954, a strike against the Kohler Company was authorized by the members of Local Union 833, and the strike was made effective on April 5, 1954. The strike was approved by the International Union, the United Automobile, Aircraft & Agricultural Implement Workers of America, the U.A.W. (R. 16, 19).¹ Taxpayer was not present at the meeting of Local Union 833 when the strike vote was taken and did not become a member of the union until August 1954, when he voluntarily joined. (R. 19, 23-24, 29.)

Beginning on May 4, 1954, before taxpayer became a member of the union, but while he was on strike,

¹ The record references are to the certified record. The original record has also been lodged with the Clerk.

taxpayer received strike benefit payments from the International Union, the U.A.W. (R. 23-24.) The union paid strike benefits on the basis of need and irrespective of membership in the union, but non-members, as well as members, had to be strikers before they could receive strike benefit payments. A distinction was made by the union in granting strike benefits to applicants depending on their marital status and number of dependents. (R. 28.)

The taxpayer received a total of \$565.54 in strike benefit payments during the taxable year 1954. These payments were in the form of vouchers for food, clothing, and payments by the union on room rent. (R. 23-24, 28.)

After investigation and audit of the taxpayer's income tax return for 1954, the Commissioner of Internal Revenue increased taxpayer's income in the amount of the strike benefit payments. This action resulted in an additional tax of \$108. Taxpayer paid the additional tax and filed a claim for refund which was rejected on the ground that the strike benefits received by him constituted income subject to tax as defined in Section 61(a) of the Internal Revenue Code of 1954. Taxpayer thereupon filed suit for refund in the United States District Court for the Eastern District of Wisconsin. (R. 15-16.) A jury rendered a verdict for the taxpayer, and the District Court entered judgment thereon. However, upon motion of the Government, the District Court set aside the verdict of the jury, vacated the judgment, and entered judgment for the

Government. (Appendix C, *infra*, p. 20.) The Court of Appeals reversed, with Judge Knoch dissenting (Appendix B, *infra*, p. 11).

REASONS FOR GRANTING THE WRIT

The Internal Revenue Service has, at least since 1920, consistently taken the position that strike benefits received from a union by a worker while on strike constitute taxable income. In the instant case, however, the Court of Appeals for the Seventh Circuit, with one judge dissenting, has held that such benefits are not to be treated as taxable income. (Appendix B, *infra*, p. 11.)

Despite the decision below, the Internal Revenue Service remains of the view that strike benefits are taxable to the recipient, whether or not such payments are made on the basis of need, and that its construction of the statute in this regard is essentially sound. Accordingly, the Service feels impelled not to abandon its long-standing position, either administratively or in litigation, unless and until authoritatively rejected.

As recognized by the district court in its opinion (Appendix C, *infra*, p. 20), although the instant case is one of first impression, the issue involved is substantial and important. According to the Bureau of Labor Statistics, many thousands of taxpayers are receiving millions of dollars in strike benefits each year. While the average benefits per worker may not be great, the need for Supreme Court review is indicated, not only by the very large number of taxpayers involved but also by the widespread and growing practice of labor unions, adverted to by the Commissioner.

(Appendix A, *infra*, p. 9), to provide such benefits without regard to a prior showing of need. That the situation may be expected to generate a great volume of tax controversy, which would inevitably add to the burden of already overcrowded court dockets, is further emphasized by the fact, likewise referred to in the Commissioner's letter, that some unions, in reliance upon the decision below, have advised their members not to report strike benefits in their income tax returns.

Accordingly, it is respectfully submitted, the fundamental reason for granting the writ, apart from the precise dollar effect on the revenue, lies in the fact that the issue is a continuing and growing one affecting a very large number of taxpayers, who are generally in the lowest tax brackets and can ill afford the costs of litigation. In these circumstances, we believe that it is in the interest not only of the Government but of the many taxpayers affected that the matter be definitively resolved at the earliest possible time.²

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals in the instant case raises a question of general importance in the administration of the tax laws which should be reviewed by this Court, notwithstanding the absence of a conflict of decisions. We believe that it is in the public interest that the Service

² The views of the Service, particularly in regard to its administrative practice and the importance of the problem, are more fully set out in the letter of the Acting Commissioner of Internal Revenue to the Solicitor General, dated April 10, 1959 (Appendix A, *infra*, p. 7).

be enabled to secure a prompt, authoritative determination of the correctness of its position.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

APRIL 1959.

APPENDIX A

U.S. TREASURY DEPARTMENT,
Washington, D.C., April 10, 1959.

Hon. J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D.C.

In re *Allen Kaiser v. United States* (C.A. 7th-No.
12317)

DEAR MR. RANKIN: In accordance with your request the following statement is made in connection with the above case regarding the consistency and uniformity of the administrative practice of the Internal Revenue Service under O.D. 552, published in 2 Cum. Bull. 73 in 1920, and as to the importance of the question revenue-wise:

The ruling position of the Service as announced in the 1920 ruling has been consistently followed over the years in a number of unpublished rulings, issued particularly to officials of labor unions, members of Congress, and field representatives of the Service. In addition, the training courses given to Revenue Agents over a reported period of at least 15 years have instructed that strike benefits are includible in gross income. Instructions in "Your Federal Income Tax" in recent years have likewise specifically so provided. There is no known instance in which such benefits have been ruled to be excludable from income. The 1920 ruling was also reaffirmed by Rev. Rul. 57-1, published in 1957-1 Cum. Bull. 15.

Regarding enforcement of this long-established ruling policy a field survey indicates that there is a

paucity of historical data on the extent to which strike benefits have been reported on returns or taxed on audit of such returns. This is not completely unexpected in view of the enforcement procedure under which only selective spot audits can be made in the case of smaller returns and the complete absence of recording of such audits by issues, the Service not having deemed it practicable to keep any such records. The replies to the field survey did, however, indicate that, so far as can be ascertained, the ruling policy has been consistently applied to any return audited in which strike benefits were received, except in a few instances in which very small amounts were involved.

The field survey indicates that there have been a few "tax drives" in this area in various parts of the country. However, taxpayer compliance with the consistent ruling position of the Service over the years cannot fairly be appraised in terms of the known instances of enforcement. Voluntary reporting must, as in the case of related items such as small dividend and interest receipts, account for the great bulk of revenue collections; and on this, as indicated, there are no Service records.

According to the Bureau of Labor Statistics, taken from the reports of labor unions and of the National Industrial Conference Board, many thousands of taxpayers are receiving million of dollars in such benefits annually. For example, according to a report made by the United Auto Workers to its membership under date of February 16, 1959, more than \$22,000,000 in strike benefits was paid to the striking members of this union alone during the calendar year 1958.

While the average benefits paid per worker may not be great, the tremendous number of taxpayers involved, combined with the fact that at least some of the unions have advised their members to rely upon

the Court of Appeals decision in the present case and not to report the strike benefits received on their returns, will, it is feared, generate a great volume of tax controversy, which cannot help but find its way onto the already over-crowded court dockets until the issue is finally resolved. It is this realization that undoubtedly led the District Court judge herein to take judicial notice of the importance of the question, as further witnessed by the fact that the A.F.L.-C.I.O. filed a brief *amicus* in the Court of Appeals.

The importance of securing a final determination as to the includibility of strike benefits in gross income seems apparent, even apart from the net revenue which may be anticipated. While the revenue per taxpayer may be small, the overall volume will be considerable in view of the great number of taxpayers involved. Moreover, enforcement costs are not great even in the cases selected for audit, and such costs must be spread over the entire taxpaying community, including the far greater number who have been and will continue voluntarily to report this item, as they have other items, such as wages, bond interest, and dividends, as to which enforcement has of necessity likewise been selective.

Although the strike benefits in the instant case covered a period both before and after taxpayer became a member of the union and were based on need, they were payable only upon his participation in the strike. Statistics published by the National Industrial Conference Board reveal that basing payments on need is not the universal practice among labor unions and that there has been a growing tendency among them to make strike benefits payable as a matter of right and without a prior showing of need. Need, according to these figures, is no longer a prerequisite with respect to 77 percent of members of national unions who receive

such benefits nationwide. Moreover, the U.A.W. at its recent convention has likewise amended its constitution so that strike benefits are based upon "The right of each member to participate in accordance with his family obligations."

The strike benefits here involved are to be distinguished from disaster benefits, such as those payable by the Red Cross, in that the strike benefits are payable only for a *quid quo pro*, namely the recipients' undertaking to go on and remain on strike, and in this sense are not to be confused with ordinary unemployment benefits, payable automatically as a matter of public beneficence and without specific consideration moving either from the recipient or to the donor.

The ruling policy of the Service regarding the taxability of strike benefits has been consistent and of long standing duration. Although it is not possible to accurately estimate the amount of revenue involved, the issue is continuing, and affects a very large number of taxpayers. For these reasons, I believe that the question is one of great importance in the administration of the Revenue laws, and that it is highly desirable, both to the many taxpayers affected and to the Government, to have the matter finally settled as quickly as possible.

Very truly yours,

CHARLES I. FOX,
(Acting) Commissioner.

APPENDIX B

In the United States Court of Appeals for the
Seventh Circuit

ALLEN KAISER, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

December 22, 1958

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

Before DUFFY, *Chief Judge*, and MAJOR AND KNOCH,
Circuit Judges.

DUFFY, *Chief Judge*: This is a suit to recover an alleged overpayment of income taxes for the year 1954. The question presented is whether strike benefits received from a union by a worker while on strike is taxable income or, in the alternative, gifts which are exempt from income tax. The jury in the District Court found the strike benefits received by plaintiff were gifts. Subsequently, the trial court set aside the verdict of the jury and entered a judgment for the defendant dismissing the complaint herein.

On April 5, 1954, plaintiff Allen Kaiser was an employee of Kohler Company of Kohler, Wisconsin. On and before said date, Local 833 UAW, an affiliate of the International Union UAW, was the certified collective bargaining agent for the production and maintenance workers employed by Kohler Company. Not all of such employees were members of the Union.

On April 5, 1954, in concert with other employees, plaintiff Kaiser went out on strike. On that date he was not a member of the Union and did not apply for membership until August 19, 1954. During the strike he did not receive any benefits in cash, but commencing May 4, 1954, he received from the Union maintenance assistance in the form of food, clothing and payments of rent on the house which he occupied with his wife and two children. The funds from which the strike benefits were distributed were derived from the local Union, the International Union, and contributions from other unions, organizations and individuals.

On April 15, 1955, Kaiser filed with the Director of Internal Revenue for the District of Wisconsin, an income tax return showing wages received in the year 1954 in the amount of \$2,669.48 with a tax liability of \$359.00. As wages withheld totaled \$388.84, he claimed a refund. On February 17, 1956, the Director, by audit, increased the adjusted gross income by adding \$565.54, the value of the maintenance assistance received by plaintiff. This resulted in a tax of \$467. The plaintiff paid the sum of \$108.00 as additional tax plus interest, and sued for a refund.

The basic condition for receiving strike assistance was the actual present need of the individual worker. By questionnaire, it was determined whether he needed food, clothing and shelter. Such assistance was not a matter of right like unemployment compensation. When plaintiff received his assistance, he neither gave nor promised anything in return. He was not required to render any service to the Union.

The learned trial judge apparently assumed that strike benefits constitute taxable income unless they are excepted as gifts. He relied on the broad scope of the definition in Sec. 61(a) of the Internal Revenue

Code of 1954 that "gross income means all income from whatever source derived." However, the Commissioner has long acknowledged that the concept of taxable income does not include all receipts even though such receipts were not specifically excepted from taxable income by statute. The Commissioner has ruled that income did not include damages for alienation of affections,¹ damages for breach of promise to marry,² an award under a wrongful death statute,³ and payments to war prisoners for mistreatment by their captors.⁴ Despite the absence of express statutory authority, the Commissioner has refused to subject to income tax the receipt of retirement benefits paid under the Federal Old Age and Survivors Insurance Systems,⁵ unemployment compensation benefits paid by a state,⁶ and public assistance relief payments.⁷

Public assistance benefits which have been ruled not to be taxable also provide an analogy to strike benefits. Both provide relief to the indigent. Strike benefits are intended to prevent want as are public assistance benefits.

In 1952, the Commissioner ruled that receipt of food and medical supplies and other forms of subsistence from the American Red Cross by a disaster victim did not represent taxable income.⁸ About a year later, the Commissioner ruled that rehabilitation payments made to victims of a tornado disaster from a special fund set up by a large employer in the area

¹ I.T. 1804, II-2 Cum. Bull. 61 (1923).

² G.C.M. 4363, VII-2 Cum. Bull. 185 (1928).

³ See I.T. 2420, VII-2 Cum. Bull. 123 (1928).

⁴ Rev. Rul. 55-132, 1955-1 Cum. Bull. 213.

⁵ I.T. 3447, 1941-1 Cum. Bull. 191.

⁶ I.T. 3230, 1938-2 Cum. Bull. 136.

⁷ Rev. Rul. 57-102, 1957-1 Cum. Bull. 26.

⁸ Spec. Rul. of I.R.S., 5 Stan. Fed. Tax. Rep. § 6196.

for the benefit of his employees and their families "do not come within the concept of gross income under the provisions of § 22(a) of the [1939] Code." The Commissioner emphasized that the contributions were measured solely by need.

We hold that the strike benefits received by plaintiff under the facts of this case are not taxable income. The question as to whether such benefits received under other circumstances might constitute taxable income is, of course, not presented on this record.

In any event, the strike benefits received by plaintiff were gifts which are expressly excepted from taxable income by § 102, Internal Revenue Code of 1954. There is substantial evidence in this record to sustain the finding of the jury. In *United States v. Burdick*, 3 Cir., 214 F. 2d 768, 771, the Court said: "As we held in *Smith v. Manning*, 1951, 189 F. 2d 348 whether the receipts are gifts is primarily a question of fact * * *"

The trial court adequately submitted the question of gift to the jury. Excerpts from the court's instructions are as follows:

"Compensation for refraining from labor is taxable income * * *";

"If it was the intention of the Union to pay for services, these payments are income";

"If these payments were made by the Union because of any obligation, either legal or moral * * * then the payments were not gifts and you should answer the question 'no'";

"If the payments were made as compensation for services, even though the Union did not consciously have that intent, they constitute income and not gifts."

After listening to and considering these instructions, the jury found that the strike benefits received by plaintiff were gifts.

* Rev. Rul. 131, 1953-2 Cum. Bull. 112.

In overruling and setting aside the verdict of the jury, the trial court was of the view that the strike benefits were made available to plaintiff pursuant to a moral obligation of the International Union to its members. However, the Union surely did not owe an obligation to plaintiff. He was not a member of the Union for four and a half months after the strike began, and yet he received strike benefits. Furthermore, there was testimony which the jury was entitled to believe that it was discretionary with the Union whether any strike benefits were to be distributed.

The second basis for the District Court's decision was that the Union exacted continued participation by plaintiff in the strike in return for receiving strike benefits. In other words, the Union, by giving plaintiff strike benefits valued at about \$17 per week, for a period of eight months, has exacted from plaintiff his continued participation in the strike and abstaining from work which previously netted him \$166 a week.

The answer to this contention is that if plaintiff, while remaining on strike at Kohler, had found temporary employment elsewhere, his strike benefits would have ceased. The same would have been true if members of his family had found employment, because the basic condition of receiving benefits was the present need of the plaintiff.

It seems clear that the strike benefits which were paid plaintiff were completely unrelated to his former earnings. The factor determining the amount of benefits paid to him was his personal need, his marital status and the number of dependents. The benefits were given because he and his family were in need after he ceased working. Such payments were consistent only with charity. We hold they were gifts and were not taxable.

The District Court placed reliance on O.D. 552, 2 Cum. Bull. 73 (1920) in which the Commissioner ruled that "Benefits received from a labor union by an individual *member* (emphasis supplied) while on strike are to be included in his gross income * * *". Although little if any attention seems to have been given to this obscure ruling from 1920 to 1957, the learned trial judge stated it must be held to have received Congressional approval and to have assumed the force and effect of law.

This 1920 ruling did not cover strike benefits paid by a union to non-members or to a situation where a union paid strike benefits to both members and non-members alike. In any event, the so-called reenactment doctrine is more properly applied to regulations, which have the force of law, than to rulings.¹⁰ It has been said the rules have "no more binding or legal force than the opinion of any other lawyer."¹¹

Significant also in the weight to be given to this 1920 ruling is the statement of the Supreme Court in the late case of *Commissioner v. Glenshaw Glass Company*, 348 U.S. 426, 431 " * * * Re-enactment—particularly without the slightest affirmative indication that Congress ever had the *Highland Farms* decision before it—is an unreliable indicium at best. * * *". This statement is particularly appropriate here, as the Government has made no showing that the 1920 rule was ever considered by Congress.

. REVERSED.

KNOCH, Circuit Judge, dissenting: As indicated in the opinion of Chief Judge Duffy, the sole question here presented is whether strike benefits received from a union by a striking worker are taxable income to him.

¹⁰ *Bartels v. Birmingham*, 332 U.S. 126, 132.

¹¹ *United States v. Bennett*, 5 Cir., 186 F. 2d 407, 410.

Chief Judge Duffy concludes that the benefits received are nontaxable gifts. After careful consideration of the case, I regretfully find myself unable to agree.

It is true that the plaintiff, a non-member of the Union, was given strike benefits only after he had shown himself to be in need of food, clothing and shelter. The amount of aid given was based, not on his former earnings, but on his personal need, marital status and number of dependents. Such benefits would not have been given, or would have terminated, regardless of his continued participation in the strike, had his need ceased to exist through receipt of income from any other source by him or a member of his family.

However, his need was a secondary qualification to which consideration was given only after he had met the primary qualification: participation in the strike. Had he not met that primary qualification, he would have received no benefits. Had he ceased to meet that primary qualification, his benefits would have terminated notwithstanding the extent of his personal need, or whether he was a member of the Union or not. The fact that these benefits were paid to members and non-members alike emphasizes the real reason for payment, namely, either class must be in necessitous circumstances, but, above all, must be on strike.

The District Court clearly indicated that the case was allowed to go to the jury only to present a full record on appeal.

Determination of the character of the strike benefits presented a question of law. All the facts, including the Union's motivation and intent, were fully disclosed by stipulation of facts and uncontroverted testimony. *Bogardus v. Commissioner* (1937) 302 U.S. 34, 58 S.C. 61, 82 L. Ed. 32; *Old Colony Trust Co. v. Com-*

missioner (1928) 279 U.S. 716, 49 S.C. 499, 73 L. Ed. 918.

The Union did require consideration for the strike benefits bestowed on plaintiff. It was stipulated by the parties:

The International Union grants strike benefits to non-members of the Union, who participate in a strike, if they do not have sufficient income to purchase food or to meet an emergency situation. The Union treats such non-members on the same basis as members of the Union, but non-members as well as members must be strikers before they may receive assistance from the Union.

The Court instructed the jury that compensation for refraining from labor is taxable income. The majority opinion holds that this was a question to be resolved by the jury. In the light of the stipulated facts it is my opinion that there was a question of law only, and that no factual issue remained to be presented to the jury.

I would affirm the District Judge's ruling that "viewing the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to plaintiff" (citing cases) as a matter of law the strike benefits constituted taxable income and not a gift."

The District Court inferred Congressional approval from repeated re-enactment of the applicable sections of the Code, in the light of the 1920 ruling (described in the majority opinion) and 38 years of consistent administrative interpretation and practice. As many persons who have paid a similar tax are said to be awaiting the outcome of this cause, a policy question exists as to the advisability of making strike benefits tax free.

This dissent having been predicated on a totally different ground, however, these matters are not reached.

JUDGMENT

Filed December 22, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WISCONSIN

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, * * * and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED; in accordance with the opinion of this Court filed this day.

APPENDIX C

In the United States District Court for the Eastern
District of Wisconsin

ALLEN KAISER, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

OPINION

The case is before the court on the government's motion, under Rule 50(b), F.R.C.P., to set aside the verdict of the jury and the judgment entered thereon and to enter judgment in accordance with the government's previous motion for directed verdict; or, in the alternative, if the motion to set aside be denied, for a new trial.

The action was brought for refund of taxes allegedly erroneously collected. The only item in issue is an amount of \$565.54 received during 1954 by plaintiff as strike benefits from the United Automobile, Aircraft and Agricultural Implement Workers of America, hereinafter referred to as the U.A.W. If such amount constitutes a nontaxable gift, plaintiff is entitled to a refund. If it represents taxable income to the plaintiff, the tax in respect thereof was correctly collected and plaintiff can have no refund.

Counsel for both parties informed the court at the time of the pretrial conference that this was a case of first impression and that there were an unbelievable number of men who had paid a similar tax under protest where a similar situation existed and who were awaiting the outcome of the trial in this case.

At the close of plaintiff's case, defendant moved for a directed verdict, and a similar motion was made at the close of all the evidence. On both occasions, the court denied the motion without prejudice. It was apparent that if this were to be a test case, it would be reviewed by appellate courts, regardless of its outcome, and the court felt that there should be a complete record so that no new trial would be necessary if the appellate court reversed.

The issue was tried before a jury and a special verdict of one question was submitted:

Were the amounts received by plaintiff, Allen Kaiser, from May 14th to December 31st, 1954, from United Automobile, Aircraft and Agricultural Implement Workers of America, a gift?

To this question the jury answered "yes". Judgment for plaintiff was entered on the verdict; Rule 58 F.R.C.P.

Stipulations filed with the court before trial set forth the following facts: At the time he paid the tax in question, Allen Kaiser was a resident of Sheboygan, Wisconsin, and in 1954 and prior thereto was an employee of the Kohler Company at Sheboygan, Wisconsin. On March 4, 1954, a strike against the Kohler Company was authorized by the members of Local Union 833, approved by the U.A.W., which strike became effective on April 5, 1954. Kaiser was not present at the meeting of the Union when the strike vote was taken. He did not become a member of the Union until August 19, 1954. The decision to become a member of the Union was voluntarily arrived at by Kaiser. He was on strike at the time he was admitted to membership in the Union. He did not pay any initiation fee or dues because he was on strike.

Beginning with May 4, 1954, before he was a member of the Union, Kaiser received strike benefit payments

from the U.A.W. It granted strike benefits to non-members who participated in the strike if they did not have sufficient income to purchase food or to meet the emergency situation. The Union treated non-members on the same basis as members, but non-members, as well as members, had to be strikers before they could receive assistance from the Union. A distinction was made by the Union between applicants in granting strike benefits to them, depending upon their marital status and number of dependents.

At the time of the declaration of the Kohler strike the U.A.W. had \$9,141,488.00 in its strike fund, and Local Union 833 had in its strike fund \$63,677.88, which latter amount was transferred to the U.A.W. in 1954 and was set up in a special bank account to deal with strike expenditures and strike needs of Kohler workers.

The Constitution of the U.A.W. contained the following provisions:

ARTICLE 12, Section 1. The International Executive Board shall execute the instructions of the International Convention and shall be the highest authority of the International Union between Conventions, subject to the provisions of this Constitution, and shall have the power to authorize strikes, issue charters and punish all subordinate bodies for violation of this Constitution.

ARTICLE 12, Section 15. If and when a strike has been approved by the International Executive Board, it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union.

"ARTICLE 16, Section 4. * * * Five cents (.05) of each month's dues payment must be laid aside by the Local Union as a special fund to be used in case of strike or lockout. * * *

ARTICLE 16, Section 11. All Local Unions shall pay to the International Union a per capita tax of one dollar and twenty-five cents (\$1.25) per month per dues-paying member, twenty-five cents (.25) of which shall be set aside in a special fund as the International Union Strike Fund, to be drawn upon exclusively for the purpose of aiding Local Unions engaged in authorized strikes and in cases of lockout, and for that purpose only, and then only upon a two-thirds vote of the International Executive Board. * * *

ARTICLE 16, Section 13. All per capita taxes, and all other monies collected for the International Union shall be transmitted to the International Secretary-Treasurer by the twentieth of each month following collection. All such per capita taxes and other monies are strictly the property of the International Union and in no case shall any part thereof be used by Local Unions, except upon permission of the International Executive Board.

ARTICLE 49, Section 1. * * * If, as a result of this decision, a strike vote is decided upon, the Local Union Executive Board shall notify all members, and it shall require a two-thirds vote by secret ballot of those voting to declare a strike. Only members in good standing shall be entitled to vote on the question of declaring a strike.

ARTICLE 49, Section 5. Before a strike shall be called off, a special meeting of the Local Union shall be called for that purpose, and it shall require a majority vote by secret ballot of all members present to decide the question either way. Wherever the International Executive Board decides that it is unwise to longer continue an existing strike, it will order all members of Local Unions who have ceased work in connection therewith to resume work and thereupon and thereafter all assistance from the International Union shall cease.

ARTICLE 49, Section 6. Any Local Union engaging in a strike which is called in violation of this Constitution and without authorization of the International President and/or the International Executive Board shall have no claim for financial or organizational assistance from the International Union or any affiliated Local Union.

The testimony at trial showed that strikers were not required to serve on the picket lines, help in the soup kitchen, or render like services in order to receive strike benefits. They were encouraged to do so and were regarded by the Union as having a moral obligation to do so. The amount of \$565.54 received by Kaiser as strike benefits was in the form of food, clothing, and payments by the Union on his room rent.

There was testimony that on occasion the Union had used money from this strike fund for flood relief and other charitable purposes. This usage is directly contrary to the express provisions of Article 16, Section 11 of the Constitution of the International Union quoted above.

Two of the arguments advanced by the government in support of its motion for a new trial have little weight: First, it is alleged that error was committed because the court did not specifically ask the jury in the verdict, whether the Union intended to make a gift of the \$565.54 to Kaiser. Accordingly, objection is made to the verdict used by the court which asked only whether the amounts received by Kaiser were a gift. To this point it is but necessary to answer that the proposed verdict submitted by the government to the court on the morning of trial consisted of a single question which asked whether "the sum * * * received by [Kaiser] from the Union * * * was a gift;" to point out that the government itself proposed an alteration in the verdict which was actually

used and expressed satisfaction in the final form of the verdict when the court accepted the alteration; and to note that at no time did the government request the court to submit a separate question on the specific item of intent. The court is satisfied that the verdict used was the proper one for this case. The matter of intention of the Union was thoroughly covered in the instructions to the jury.

The government also claims that the court's instructions were erroneous in that they included an instruction to the effect that the absence or presence of consideration in the legal sense is not the controlling factor in cases involving the question whether voluntary payment for services is compensation or income, but the sole question in that respect is the intention with which the payment was made. Also claimed to be erroneous is that part of the instructions which stated that whether the receipts were gifts is primarily a question of fact to be resolved under the peculiar circumstances of this case, and that in determining whether the payments were gifts, the intention with which the payments, however voluntary, were made, rather than the presence or absence of consideration therefor, controls. To these objections it may be answered that when the context is considered it is clear that the court was not instructing the jury to disregard the presence of legal consideration, if it found such to exist, but rather the court, in accordance with the law, was instructing the jury that a voluntary payment made without the presence of legal consideration may nonetheless be taxable income rather than a gift if the intent of the payor was to confer a reward for some service or benefit to him. Such an instruction was clearly to the benefit of the government. Examination of the instructions as a whole reveals that the court repeatedly instructed the

jury that if the payments were made by the Union in exchange or return for something the Union wanted from Kaiser, the jury must find the \$565.54 to be taxable income. The court told the jury that before it could find the strike benefit to be a gift, it must find that the amount was not paid—

As compensation for refraining from labor (Tr. 141).

Under any legal or moral obligation (Tr. 142).

As compensation for services (Tr. 143).

As a remuneration for something the Union wanted done or omitted (Tr. 143).

As anything due to the plaintiff (Tr. 143).

In expectation of any return (Tr. 143).

However, the government's motion is more soundly based, insofar as it rests on the contention that under the evidence of the case, "viewing the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to plaintiff" [*Shaw v. Hines Lumber Co.* (C.A. 7, 1957) 249 F. 2d 434, 439], as a matter of law the strike benefits constituted taxable income and not a gift.

The evidence in this case is not disputed. The question basically is one of interpretation of the statutes. Findings are held to be subject to review on this question. *Bogardus v. Commissioner* (1937), 302 U.S. 34, 38-39, 58 S. Ct. 61, 82 L. Ed. 32; *Willkie v. Commissioner* (C.C.A. 6, 1942) 127 F. 2d 953, 955; cert. den. 317 U.S. 659, 63 S. Ct. 58, 87 L. Ed. 530.

The 1954 Code sections applicable to the question are sections 61(a) and 102(a). Section 61(a) defines gross income as "all income from whatever source derived." Section 102(a) provides that "gross income does not include the value of property acquired by gift * * *". Thus, gross income is defined in sweeping terms and should be broadly construed in

accordance with an obvious purpose to tax income comprehensively.¹ The definition is very comprehensive,² intended to be far-reaching, and indicates the purpose of Congress to use the full measure of its taxing power.³ Construction should be liberal and consonant with that purpose. On the other hand, provisions granting exemption from tax, such as 102 (a), are to be construed strictly and with restraint.⁴ Words of exemption or exclusion are not to be extended beyond their plain meaning,⁵ and exemptions cannot rest upon implication.⁶ Specifically, section 102(a), exempting gifts from income tax, should not be construed liberally in favor of one claiming the exemption, but rather in such way as to give section 61(a) its proper effect.

As previously indicated, the material facts in this case are all either stipulated or supported by uncontroverted testimony. It is not disputed that the strike benefits were paid by the International Union on the basis of need and irrespective of membership in the Union. These facts, standing alone, indicate a gift. But it is also undisputed that the strike was being conducted with the approval of the International

¹ *Commissioner v. Jacobson* (1949) 336 U.S. 28, 48-49, 69 S. Ct. 358, 93 L. Ed. 477.

² *Commissioner v. Lo Bue* (1956) 351 U.S. 243, 246-247, 76 S. Ct. 809, 100 L. Ed. 1142; reh. den. 352 U.S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69.

³ *Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 429-430, 75 S. Ct. 473, 99 L. Ed. 483; reh. den. 349 U.S. 925, 75 S. Ct. 657, 99 L. Ed. 4256; *Helvering v. Clifford* (1940) 309 U.S. 331, 334, 60 S. Ct. 554, 84 L. Ed. 788.

⁴ *Commissioner v. Jacobson*, *supra* n. 1, 336 U.S. 48-49.

⁵ *Helvering v. American Dental Co.* (1942) 318 U.S. 322, 329, 63 S. Ct. 577, 87 L. Ed. 785.

⁶ *U.S. Trust Co. v. Helvering* (1939) 307 U.S. 57, 60, 59 S. Ct. 692, 83 L. Ed. 1104.

Executive Board, that Article 12, Section 15 of the International Union Constitution made it "the *duty* of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union" (emphasis supplied), and that it was required of every person to whom benefits were paid that he join the strike and continue to remain on strike. If plaintiff had been a member of the Union before the strike and had paid his dues, deductible by him and not taxable as income to the Union, he would certainly have had a moral right to strike benefits and might well have been able to enforce that right if the Union arbitrarily denied benefits to him. In such a case an even more clear-cut question would be presented.

A gift, within the meaning of section 102(a), is the receipt of financial advantages gratuitously,⁷ is made from a detached and disinterested generosity,⁸ without the incentive of anticipated benefit of any kind beyond satisfaction of doing a generous act,⁹ without consideration,¹⁰ for that only is a gift which is purely such,¹¹ without the compulsion of moral or legal duty,¹² and is basically something for nothing.¹³ The

⁷ *Helvering v. American Dental Co.*, *supra*, n. 5, 318 U.S. 329; *United States v. Burdick* (C.A. 3, 1954) 214 F. 2d 768, 771.

⁸ *Commissioner v. Lo Bue*, *supra*, n. 2, 351 U.S. 246-247.

⁹ *Bogardus v. Commissioner* (1937) 302 U.S. 34, 41, 58 S. Ct. 61, 82 L. Ed. 32.

¹⁰ *Webber v. Commissioner* (C.A. 10, 1955) 219 F. 2d 834, 836; *Noel v. Parrott* (C.C.A. 4, 1926) 15 F. 2d 669, 671; cert. den. 273 U.S. 754, 47 S. Ct. 457, 71 L. Ed. 875; *Schumacher v. United States* (Ct. Cl., 1932) 55 F. 2d 1007, 1011.

¹¹ *Bass v. Hawley* (C.C.A. 5, 1933) 62 F. 2d 721, 723.

¹² *Bogardus v. Commissioner*, *supra* n. 9, 302 U.S. 41.

¹³ *Commission v. Lo Bue*, *supra* n. 2, 351 U.S. 247; *Commissioner v. Jacobson*, *supra* n. 1, 336 U.S. 50; *Helvering v. American Dental Co.*, *supra* n. 5, 318 U.S. 331.

voluntary character of the payment is not determinative, for a payment may constitute income to the recipient though made to him without legal obligation.¹⁴

Applying these rules of law and construction to the undisputed evidentiary facts, it is the opinion of this court that as a matter of law the payments to Kaiser constituted income taxable to him and cannot be brought within the gift exclusion. The payments were made to its members by the International Union under a moral obligation imposed by its Constitution. They were made to all strikers pursuant to a plan whereby something of value to the Union was exacted in return from the recipient, namely, his continued participation in the strike. Either reason is sufficient to prevent the payments from being a gift.

This conclusion is also demanded by the administrative treatment of strike benefits. In 1920, by O.D. 552, C.B. No. 2, p. 73, Internal Revenue issued and promulgated a ruling which dealt with the point in issue in this case:

Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received, there being no provision of law exempting such income from taxation.

For thirty-eight years, except as reaffirmed by Rev. Rul. 57-1, I.R.B. 1957-1, 10, this ruling has remained unchanged through repeated Congressional re-enactments of the relevant income tax sections (now 61(a) and 102(a) of the 1954 code.)¹⁵ Thus, the administrative interpretation and practice must be said to have always been seasoned and settled, uniform and consistent. Considering the length of time the unvaried

¹⁴ *Old Colony Trust Co. v. Commissioner* (1929) 279 U.S. 716, 730, 49 S. Ct. 499, 73 L. Ed. 918; *United States v. Burdick*, *supra* n. 7, 214 F. 2d 771.

¹⁵ *Commissioner v. Jacobson*, *supra*, n. 1, 336 U.S. 48-49.

ruling and practice has been in effect, the non-technical nature of the question, and the importance of the issue in both the tax and labor fields, it must be concluded that Congress was aware of the administrative interpretation when it repeatedly re-enacted the sections. Under such circumstances, the administrative interpretation is not only entitled to great weight, but must be held to have received Congressional approval and to have assumed the force and effect of law. *Corn Products Co. v. Commissioner* (1955) 350 U.S. 46, 52-53, 76 S. Ct. 20, 100 L. Ed. 29; reh. den. 350 U.S. 943, 76 S. Ct. 297, 100 L. Ed. 823; *United States v. Leslie Salt Co.* (1955), 350 U.S. 383, 389, 76 S. Ct. 416, 100 L. Ed. 441; *Commissioner v. South Texas Lumber Co.* (1948), 333 U.S. 496, 501, 68 S. Ct. 695, 92 L. Ed. 831; reh. den. 334 U.S. 813, 68 S. Ct. 1014, 92 L. Ed. 1744; *Crane v. Commissioner* (1947), 331 U.S. 1, 7-8, 67 S. Ct. 1047, 91 L. Ed. 1301; *Commissioner v. Flowers* (1946), 326 U.S. 465, 469, 66 S. Ct. 250, 90 L. Ed. 203; *Boehm v. Commissioner* (1945), 326 U.S. 287, 291-292, 66 S. Ct. 120, 90 L. Ed. 78; *White v. United States* (1938), 305 U.S. 281, 291, 59 S. Ct. 179, 83 L. Ed. 172; *Helvering v. Winnill* (1938), 305 U.S. 79, 83, 59 S. Ct. 45, 83 L. Ed. 52; *Zillmer v. United States* (C.A. 7, 1956), 238 F. 2d 912, 914; *Parker Pen Co. v. O'Day* (C.A. 7, 1956), 234 F. 2d 607, 609-610; *Gunn v. Dallman* (C.A. 7, 1948), 171 F. 2d 36, 38; cert. den. 336 U.S. 937, 69 S. Ct. 747, 93 L. Ed. 1095.

Nor is a distinction to be made, looking to this early administrative ruling, between strike benefit payments to members and, as occasionally happens, to non-members. As pointed out, in neither case can the payments be gifts.

“ * * * The determination that strike benefit payments are includible in gross income is not affected by * * * the fact that such payments or distributions are also made to persons who

are not members of the union. * * * Rev.
Rul. 57-1, I.R.B. 1957-1, 10.

The court is aware of the line of decisions holding that when the Internal Revenue Service makes a ruling on an obscure question, on a question that does not recur repeatedly, where a construction is neither uniform, general, nor of long standing, it is not entitled to substantial weight. The basis of that rule is that it is not to be presumed that Congress follows all the rulings of the Internal Revenue Service. This case involves a situation where a ruling is not only of long standing but concerns, and has over the years, thousands and thousands of men. It is a matter of great public interest. The court is of the opinion that it falls within the type situation where repeated congressional re-enactments of the tax sections, without change, should be held to be an acquiescence in the administrative interpretation and practice.

One would also be loathe to believe that Congress intended that each one of these cases, of which there are thousands, should be tried as a question of fact. If such were the situation, the results would not be uniform, the cost would be prohibitive both to the taxpayer and the government, court calendars would be flooded with these cases, the government would have to vastly increase its staff of attorneys, and chaos and inequities would be the result. The court believes that if such a situation is to be brought about, it should be brought about by Congress. It is inconceivable that Congress did not intend the law to be uniform.

There is no ground for believing that it has suddenly become the intent of Congress, without any official act or indication, to reverse the situation that has existed for almost forty years and now treat strike benefits as tax-free gifts. It is not the province of the courts to legislate in tax matters either di-

rectly, by their own pronouncements, or indirectly, but equally effectively, by allowing jury verdicts to stand which are contrary to law. To do so is to pervert the judicial power. *Heiner v. Donnan* (1932), 285 U.S. 312, 331, 52 S. Ct. 358, 76 L. Ed. 772.

For the foregoing reasons, the court believes that no jury issue was presented and that the government was entitled to have its motion for directed verdict granted.

Counsel for the United States are directed to prepare an appropriate order, submitting it to counsel for the plaintiff for approval as to form only.

Dated, Milwaukee, Wisconsin, this 19th day of February, 1958.

K. P. GRUBB,
U.S. District Judge.

In the United States District Court for the Eastern
District of Wisconsin

ORDER

This cause coming on to be heard upon a motion of the defendant for judgment in accordance with defendant's motion for directed verdict, or in the alternative, for a new trial, and the Court having considered each of the motions,

It is ORDERED: That the motion of the defendant to set aside the verdict and the judgment entered thereon for the plaintiff, and for judgment for the defendant notwithstanding the verdict in accordance with defendant's motion for a directed verdict is granted, and judgment for the defendant may be entered accordingly; and

IT IS FURTHER ORDERED: That defendant's alternative motion for a new trial is denied.

Dated at Milwaukee, Wisconsin, this 12th day of March, 1958.

/s/ K. P. GRUBB,
United States District Judge.

Approved as to form only:

/s/ Max Raskin,
MAX RASKIN,
Attorney for Plaintiff.

In the United States District Court for the Eastern
District of Wisconsin

JUDGMENT FOR DEFENDANT

This cause came on for trial before the Court and a jury on the 14th day of November, 1957, both parties appearing by counsel, and the Court on motion of the Defendant having set aside the verdict for the plaintiff and the judgment entered thereon, and having granted defendant's motion for a directed verdict in its favor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That plaintiff take nothing; that the action be and it is hereby dismissed on the merits; and that defendant have and recover from plaintiff its costs in the action.

Dated at Milwaukee, Wisconsin, this 28th day of March, 1958.

K. P. GRUBB,
United States District Judge.

APPENDIX D

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) **GENERAL DEFINITION.**—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

(26 U.S.C. 1952 ed., Supp. V, Sec. 61.)

O.D. 552, 2 Cum. Bull. 73 (1920):

Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received, there being no provision of law exempting such income from taxation.

Rev. Rul. 57-1, 1957-1 Cum. Bull. 15:

The Internal Revenue Service has been requested to reconsider the position it stated in O.D. 552, C.B. No. 2, 73 (1920), which holds that strike benefits received by a member of a labor union are includible in his gross income for the year during which received. A similar position was taken in I.T. 1293, C.B. I-1, 63 (1922), to hold that amounts paid by an organized union as unemployment benefits to its unemployed members are includible in the gross income of the recipients.

Members of a labor union pay dues to the union, a portion of which is laid aside in a special fund to be used in case of a strike or lockout. Strike benefits are paid according to individual need and have no correlation to the amount of dues paid by the recipient, or to the amount of benefits received by other members. The strike benefit payments, which are not paid pursuant to any contract, are paid to members as well as nonmembers of the union. Presumably, any benefits to nonmembers are equally in furtherance of the objectives of the strike. The specific question presented is whether the strike benefit payments paid under the above circumstances constitute income or whether they are tax free gifts to the recipients.

Section 61 of the Internal Revenue Code of 1954 states that "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived * * *." This section has the same breadth of scope as section 22(a) of the Internal Revenue Code of 1939 and executes the mandate of the 16th Amendment to the Constitution. See U.S. Senate Report No. 1622, 83rd Congress, 168. For a recent reiteration of this principle, see *Commissioner v. Glenshaw Glass Company et al.*, 348 U.S. 426, Ct. D. 1783, C.B. 1955-1, 207. As pointed out by the Court in that case, Congress applied no limitation as to the source of tax-

able receipts, nor restrictive labels as to their nature.

Strike benefit payments are included within the broad definition of gross income and do not fall within any of the exclusions provided for in the Code, including the exclusions for gifts under section 102. They are paid only upon the event of a strike which is a means employed by the union and its members for securing economic benefits, and, for this reason, they do not constitute amounts gratuitously paid or received. The determination that strike benefit payments are includible in gross income is not affected by the fact that such payments may take the form of staple goods which are distributed on the basis of need or the fact that such payments or distributions are also made to persons who are not members of the union.

The above position does not conflict with I.T. 3230, C.B. 1938-2, 136, wherein unemployment compensation benefits, paid by a state agency from funds withdrawn from the Federal Unemployment Trust Fund pursuant to Title IX of the Social Security Act, were not considered as taxable income, or I.T. 3447, C.B. 1941-1, 191, wherein benefits under the Social Security Act were held not subject to taxation. The benefits in these cases were held not to constitute taxable income because it was believed that Congress intended that such benefits be not subject to tax. However, there is no evidence that Congress intended to exclude strike benefits from income. Nor does the above position conflict with S.S.T. 247, C.B. 1938-1, 449, wherein it was held that strike benefits do not constitute "wages" for the purposes of the Social Security Act, since such benefits do not constitute remuneration for services paid by an employer to an employee. Consistent with the holding therein made, it is held that strike benefits do not constitute wages paid by the union to its members for purposes of income

tax withholding and the taxes imposed by the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. Such benefits are nevertheless income and, as such, are includible in gross income for Federal income tax purposes.

Revenue Ruling 131, C.B. 1953-2, 112, which holds that disaster benefits provided by an employer for his employees are not taxable income, is also distinguishable from the instant situation. That Revenue Ruling stated, in part, "such contributions, measured solely by need, are considered gratuitous and spontaneous." Such situation does not exist in the instant case since the payments made are neither spontaneous nor primarily donative in character but are made in furtherance of a strike, which is a means employed to secure legitimate economic benefits for members of the union.

Revenue Ruling 54-190, C.B. 1954-1, 46, holds that noncontractual payments made out of a union fund are nevertheless taxable to the recipient union members. In that ruling, the pensions paid to the members were directly attributable, to their employment while members of the union as well as to their payment of union dues. The pensions could not be said to be paid to them without consideration and, therefore, were not gifts.

Accordingly, the strike benefit payments received under these circumstances do not constitute gifts but constitute income and are includible in the gross income of the recipients even though distributed on the basis of their need and regardless of whether the recipients are members or nonmembers of the union. If the benefits are paid in goods rather than cash, the fair market value of the goods at the time received is the amount to be included in gross income.

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Office Supreme Court, U.S.

FILED

MAY 20 1959

JAMES R. BROWNING, Clerk

N [REDACTED] 55

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

UNITED STATES OF AMERICA,
Petitioner,
v.

ALLEN KAISER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 858

UNITED STATES OF AMERICA,

Petitioner,

v.

ALLEN KAISER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

Respondent adopts, for purposes of this Memorandum, the material in the Government's Petition under the headings, "Opinions Below," "Jurisdiction," "Question Presented," "Statute and Rulings Involved," and "Statement."

Argument

1. *The decision of the court below is plainly correct.*

Although section 61(a) of the 1954 Code defines "gross income" to mean "all income from whatever source de-

rived," the Commissioner of Internal Revenue, as the court below noted, "has long acknowledged that the concept of taxable income does not include all receipts even though such receipts were not specifically excepted from taxable income by statute." Pet. 13 and rulings cited. The court below concluded that the strike benefits received by the taxpayer are properly within the general category of receipts not deemed taxable income.

This conclusion is unassailable. Strike benefits are similar in their nature and purpose to the many types of receipts which have been held not to constitute income. Strike benefits are closely comparable, for example, to retirement benefits paid under the Federal old age and survivors insurance system; social security benefits paid by Panama; unemployment benefits paid by a state; food, medical supplies and other forms of subsistence furnished to disaster victims by the American Red Cross; and rehabilitation payments made to victims of a tornado disaster from a special fund set up by an employer in a disaster area for the benefit of employees and their families and pensioners; I.T. 3447, 1941-1 C.B. 191; Rev. Rul. 56-135, 1956-1 C.B. 56; I.T. 3230, 1938-2 C.B. 136; Special Ruling, 5 Stan. Fed. Tax Rep. (1952) par. 6196; Rev. Rul. 131, 1953-2 C.B. 112. All these benefits have been held not to constitute income and are, therefore, not subject to tax. The Government makes no attempt in its Petition to distinguish these clearly-analogous situations from the case at bar or to indicate any ground for treating strike benefits differently from these quite similar categories of receipts.

The court below is also on solid ground in the second basis for its conclusion, namely that the strike benefits partook of the nature of gifts. The court's basic reasoning was that there was no consideration flowing from the recipients of the benefits and that the benefits were, accordingly, prop-

erly to be classified as gifts.* The Government makes no answer in its Petition to the court's clear and convincing reasoning.

All the Government does is to refer to the Commissioner's reliance upon an asserted administrative policy; but this reliance is totally misplaced. The Service's administrative position was expressed in an obscure ruling, O.D. 552, 2 C.B. 73 (1920) (Pet. 34) dealing with strike benefits "received from a labor union by an individual member while on strike." No other public reference was made to the problem until 1957 when the Service issued Rev. Rul. 57-1, 1957-1 C.B. 15 (Pet. 35). It has never been dealt with in a Regulation. The court below refused to apply the reenactment doctrine, noting that the "Government has made no showing that the 1920 rule was ever considered by Congress." (Pet. 16). Nor has the ruling ever been considered by the courts. See Pet. App. A. Accordingly, the court below very properly refused to give weight to the old O.D. and reached the only possible result: that strike benefits are not taxable income.

2. We respectfully suggest that, of the three possible alternative courses of action open to the Court, affirmance would appear most appropriate.

The three possible alternatives, of course, are:

(i) The Court may decide to deny certiorari because of the absence of a conflict of decisions.

*The dissenting judge's disagreement with the majority was based on the fact that "participation in the strike" (Pet. 17) was a requisite to strike benefits. But how could it have been otherwise? The payments were "strike benefits." What possible basis could there have been for paying strike benefits to people not on strike? The fact that benefits are limited to a particular class does not thereby make them taxable; for example, retirement and unemployment benefits paid under the Federal social security system are limited to a particular class, but the Commissioner has nonetheless held that they are not taxable income.

(ii) The Court may, however, give heed to the Solicitor General's plea that "the issue is a continuing and growing one affecting a very large number of taxpayers, who are generally in the lowest tax brackets and can ill afford the costs of litigation" (Pet. 5) and to the position of the Internal Revenue Service that, "despite the decision below," it will not "abandon its long-standing position, either administratively or in litigation, unless and until authoritatively rejected" (Pet. 4). In view of these considerations and particularly in view of the great number of low-bracket taxpayers involved, the Court may desire to grant certiorari and hear argument on the merits despite the absence of real doubt as to the correctness^{ness} of the decision below. We concur in the Government's conclusion that the decision in the instant case "raises a question of general importance in the administration of the tax laws which should be reviewed . . . notwithstanding the absence of a conflict of decisions" (Pet. 5).

(iii) The third alternative, and, we respectfully submit, the most appropriate one, would be for the Court to grant certiorari for the reasons indicated in paragraph (ii) above, and to affirm the decision below as plainly correct. Cf. *United States v. Lane Motor Co.*, 344 U.S. 630. The question here in issue is presented in so many cases, each of which involves a small amount, that the Internal Revenue Service has issued an order to its field officers requiring the maintenance of these cases in status quo, pending the decision of the present case. News Release No. IR-290, dated May 1, 1959. The suggested summary affirmance would be the most expeditious way of disposing of this widespread problem and would resolve the controversy created by the intransigence of the Internal Revenue Service without burdening this Court's docket.

Conclusion

It is respectfully submitted that, of the three alternatives available to the Court, the issuance of the writ and the summary affirmance of the decision below, would appear the most appropriate course.

Respectfully submitted,

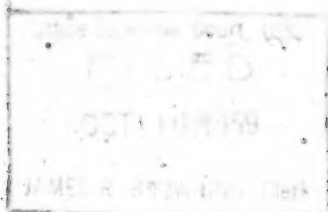
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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN KAISER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 55

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN KAISER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 58-64) is reported at 262 F. 2d 367. The opinion of the district court (R. 45-54) is reported at 158 F. Supp. 865.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1958 (R. 64-65). The petition for a writ of certiorari was filed on April 21, 1959, and granted on June 1, 1959 (R. 65; 359 U.S. 1010). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether strike benefits received from a union by a worker while on strike are taxable income under the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

SEC. 102. GIFTS AND INHERITANCES.

(a) *General Rule.*—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

STATEMENT

1. On April 5, 1954, the International Union, UAW (United Automobile, Aircraft & Agricultural Implement Workers of America), and its Local Union 833, jointly designated as the bargaining representative of the employees of the Kohler Company of Kohler, Wisconsin (R. 14-15), called a strike against the Company in support of contract demands (R. 16, 28). The strike had been voted by the members of the Local and approved by the Executive Board of the International (R. 16, 19, 28). Shortly after the strike began, the International established a program under which financial aid, in the form of food vouchers and payment of rent and utility bills (R. 23-25, 30), was given to all strikers who could demonstrate their need (R. 23, 29), the amount of aid being determined by

the number of dependents (R. 23). Aid was given without distinction between members and nonmembers of the union (R. 23). It was not the practice of the union to give aid to members unemployed for reasons other than participation in an authorized strike (R. 58).

By November 1957, the International had given in excess of \$9,000,000 in strike aid to the Kohler employees (R. 58). At the beginning of the strike, the International had \$9,141,488 in its strike fund and the Local had \$63,677, which amount was transferred to the International after the strike began (R. 20). Contributions in undisclosed amounts were also received "from other Local Unions, both the UAW Locals and Locals outside of the UAW, fraternal organizations, and business men and so on" (R. 29, 31).

2. The constitution of the International Union, under which the strike aid program was established, provided (R. 17-19):

ARTICLE 2. OBJECTS.

SECTION 1. To improve working conditions, create a uniform system of shorter hours and higher wages; to maintain and protect the interests of workers under the jurisdiction of this International Union.

* * * * *

SECTION 3. To improve the sanitary and working condition of employment within the factory, and in the accomplishment of these necessary reforms we pledge ourselves to utilize the conference room and joint agreements; or if these fail to establish justice for the workers under

the jurisdiction of this International Union to advocate and support strike action.

ARTICLE 12. DUTIES OF THE INTERNATIONAL EXECUTIVE BOARD.

SECTION 1. The International Executive Board * * * shall have the power to authorize strikes * * *

SECTION 15. If and when a strike has been approved by the International Executive Board, it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union.

ARTICLE 16. INITIATION FEES AND DUES.

SECTION 4. * * * Five cents (.05) of each month's dues payment must be laid aside by the Local Union as a special fund to be used in case of strike or lockout. * * *

SECTION 11. All Local Unions shall pay to the International Union a per capita tax of one dollar and twenty-five cents (\$1.25) per month per dues-paying member, twenty-five cents (.25) of which shall be set aside in a special fund as the International Union Strike Fund, to be drawn exclusively for the purpose of aiding Local Unions engaged in authorized strikes and in cases of lockout, and for that purpose only,

and then only upon a two-thirds vote of the International Executive Board. * * *

ARTICLE 49. STRIKES.

SECTION 5. * * * Wherever the International Executive Board decides that it is unwise to longer continue on existing strike, it will order all members of Local Unions who have ceased work in connection therewith to resume work and thereupon and thereafter all assistance from the International Union shall cease.

SECTION 6. Any Local Union engaging in a strike which is called in violation of this Constitution and without authorization of the International President and/or the International Executive Board shall have no claim for financial or organizational assistance from the International Union or any affiliated Local Union.

3. Respondent, an employee of the Kohler Company who participated in the strike, received from the union during the taxable year 1954 strike benefits totalling \$565.54 (R. 19). He was not a member of the union when the strike began nor when, on May 4, 1954, he began receiving strike benefits (R. 19). He joined the union on August 19, 1954 (R. 16).

Respondent did not include the strike benefits received in the gross income shown on his income tax return for 1954. The Commissioner, after audit, determined that those amounts were includible (increasing respondent's adjusted gross income to \$3,235.02) and found an additional tax due of \$108 (R. 13). Respondent paid the additional tax and in

due course brought this suit for refund in the United States District Court for the Eastern District of Wisconsin (R. 1-3).

The jury, in a special verdict, answered "Yes" to the question, "Were the payments made to plaintiff * * * a gift?" (R. 45). The district court set aside the verdict and entered judgment for the Government (R. 55-56), holding that as a matter of law the payments were not gifts (R. 45-54). The court of appeals, with Judge Knoch dissenting, reversed, holding that the strike benefits received by respondent (1) were not within the definition of gross income in § 61(a) of the Internal Revenue Code of 1954¹ and (2) were in any event excludible "gifts" within the meaning of § 102(a) (R. 58-64).

SUMMARY OF ARGUMENT

I

To the court of appeals, the payment of strike benefits is "consistent only with charity" (R. 62), while in the Government's view their purpose is to further the economic objectives of the union. Since that difference of view underlies the disagreement in this case, and its resolution may well be determinative of the result, it is appropriate at the outset explicitly to examine the nature of strike benefits and the purposes they serve.

A. The union constitution provides that a strike fund shall be created by setting aside 25 cents of each member's monthly dues and shall be used "exclusively

¹ Unless otherwise indicated, section references are to the Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.).

for the purpose of aiding Local Unions engaged in authorized strikes" (R. 18). Just as the constitution is the basic contract among the members, those provisions constitute an agreement among the members to support each other's strikes by contributing to a common fund for that purpose. While the obligation thereby created to pay strike benefits may run only to striking members, the obligation to them is also to pay benefits to the nonmembers supporting their strike. Thus payment of strike benefits is essentially the satisfaction of an express contractual obligation undertaken for a *quid pro quo*—the mutual obligations running to all the members.

Quite apart from that obligation, moreover, the constitution shows that the purpose of the union in paying strike benefits is to further the economic interests of those it represents, for that is the stated object of the union as a whole and there is nothing to indicate that the strike fund provisions were intended to have some different object. If, therefore, the payment of strike benefits does in fact further those interests, there is no justification for attributing to the union some different purpose in paying them.

B. Strike benefits, we submit, directly promote the economic objectives of the union by strengthening strikes called to achieve those objectives. While admittedly employees are induced to strike by many reasons, it cannot be denied that the degree of economic hardship suffered is one of the factors influencing their will and ability to continue, and strike benefits, by relieving that hardship to some degree, necessarily operate to encourage the strike. That function

of strike benefits fully explains why they are conditioned on need: those in need are particularly the ones who require financial support in order to be able to remain on strike.

Nor is it relevant that the bulk of the strike fund came from dues paid by members of other locals who have no direct interest in the outcome of the Kohler strike, for the very reason for the existence of the International and its strike fund is a recognition that the interests of all the locals are interdependent and that the consolidation of their resources strengthens them all.

C. Not only do the economic objectives stated in the constitution fully explain the payment of strike benefits, thus making resort to some other explanation unnecessary, but the explanation by the court of appeals—charity—is itself inadequate. In the first place, the limitation of benefits to a class of persons defined only by their participation in a union-authorized strike—*i.e.*, one that by definition serves union purposes—is inconsistent with the concept of charity. Secondly, charity is usually a response to a need autonomously created, whereas the hardship alleviated by strike benefits is incurred at the request of the union itself. Thirdly, the payments are not made spontaneously but in execution of a contract (the constitution) by which all the members agreed to contribute to a fund for their mutual support, with each contributor having equal prospects of being the ultimate recipient. Finally, a charitable impulse does not seem a realistic explanation of why the members would agree, by their constitution, to exact from them-

selves monthly contributions to the strike fund. The advantages of concerted action do not extend to charitable giving and each member might be expected to retain control over his own charity. The charitable explanation is also inconsistent with the ground upon which legal sanction has been given to requiring all employees in a union shop to pay dues—namely, that all the employees derive economic benefits from the union's activities.

D. From the point of view of the employee, the direct causal relationship between his striking and his receipt of the benefits justifies characterization of the payments as being "for" his striking. Not only must he be striking at the time in order to receive the payment, but his striking was at the request of the union and his receipt of strike benefits, by relieving his immediate needs, encourages him to continue striking in the future. In addition, although not essential to our point, his striking invokes, as noted above, an obligation of the union to pay him strike benefits. Whether or not legally enforceable, that obligation completes the causal relationship between the employee's striking and his receipt of benefits.

II

A. From the foregoing there appear at least four elements of strike benefits which preclude their characterization as "gifts":

1. They are paid for a "business" reason—namely, to promote the economic objectives of the union. While some of the lower courts seemingly hold that a payment may be a gift even though made for busi-

ness reasons, the decisions of this Court establish that even voluntary payments are gifts only if they are made for a "gift reason" such as "spontaneous" or "detached and disinterested" generosity, "affection, respect, admiration, charity" or the like. *Bogardus v. Commissioner*, 302 U.S. 34; *Robertson v. Commissioner*, 343 U.S. 711; *Commissioner v. LoBue*, 351 U.S. 243. Not being given for such reasons, strike benefits are not gifts.

2. Anticipated benefit to the union, through encouraging continuation of the strike, is one of the reasons for their payment. Whatever the effect of other kinds of business reasons for a payment, a payment induced by anticipated benefit to the payor is clearly not a gift.

3. The payment is made to one who is currently performing acts requested by and of benefit to the union. The direct causal relationship between the employee's striking and his receipt of benefits requires a characterization of the payments as being "for" striking, hence compensation, and hence not a gift.

4. The payment is made pursuant to an obligation created by an agreement among the members to support each other's strikes and imposed on the union by its constitution. Payments made pursuant to an obligation, not itself created by a gift, are not gifts.

B. None of the authorities relied upon below supports a gift characterization here. Public gratuities (social security, unemployment compensation, relief) are "charity" in its purest form and hence gifts for tax purposes,¹² as of course is Red Cross disaster aid.

¹² We use the term "charity" here not in the popular sense but only in the special sense relevant for tax purposes: a concern for the public good, untainted by motives of private advantage. Cf. § 170(c) (1) of the 1954 Code, recognizing as "charitable" all gifts made to a governmental unit for "public purposes."

But strike benefits, paid to further the union's own economic objectives, lack the the very essence of charity: the absence of economic self-interest.

Nor do any of the cases support the treatment of strike benefits as noncharitable gifts. Payments on account of services received by the payor in the past—widow bonuses and pensions to retired ministers or employees—lack the elements present here of prospective benefit, current performance of services, and an obligation to make the payments.

C. If not exempt as gifts, strike benefits are includible in gross income, for, as *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, teaches, the definition of gross income includes all realized "gains" from whatever source, subject only to the express statutory exclusions. Moreover, a gain derived from refraining from labor would meet even the *Eisner v. Macomber* definition of income.

D. There is nothing in the nature of a union or its objects that justifies special treatment of payments made to further those objects. The object of a union to improve terms of employment has been recognized as a "business" function for many purposes. It is on that ground, as noted above, that requiring all employees in a union shop to pay dues has been justified. More important for present purposes, union dues have long been held deductible as business expenses for the reason that the funds are used by the union to further the "trade or business" (employment) of the members. If the purpose for which union funds are used is deemed a "business" purpose in allowing deduction of dues, consistency requires that it likewise

be treated as a "business" purpose in determining taxability of payments made for the very purposes for which the dues are contributed. Otherwise, ordinary income would escape taxation: contributions to the strike fund (dues), being deductible, reduce the income taxable to the members and hence come "out of" income, yet would still not be taxed when paid out as strike benefits.

E. Finally, the Commissioner has consistently ruled since 1920 (the same time that he ruled union dues to be deductible) that strike benefits are includible in gross income. That interpretation, outstanding for 39 years through repeated reenactments of the statute, is entitled to great weight and, being fully supported, should be controlling here.

III

The evidentiary facts being undisputed, the question whether strike benefits are a gift is one of law that may be decided by the Court. E.g., *Bogardus v. Commissioner*, 302 U.S. 34, 38-39. Whether the payor "intends" a payment "as" a gift or "as" compensation, apparently treated as a question of "fact" by the court below, itself involves a conclusion of law, for those characterizations are no more than statements of legal consequences. The only question of "intent" relevant is the reason why the payor was induced to make the payment, and once that is established, it is a question of law whether the causal relationships disclosed justify characterization of the payment as a "gift" or as "compensation."

Here, we believe, the reasons for the payment of strike benefits present no question of fact for the jury. In the first place, the objective facts of the payments (payment only to strikers, a class defined by their support of union objectives) foreclose the only "gift reason" for the payments (charity) that has been suggested. In the second place, "intent" in this case refers not to the state of mind of any identifiable person or persons but to the institutional purpose to be inferred from the provisions of the union constitution. That intent, like the "intent" of Congress inferred from a statute, turns essentially upon a construction of the written document, a function traditionally allocated to the court rather than the jury.

Not only is the question analytically one of law, but the practical need for a rule of universal application to govern the taxability of the strike benefits paid yearly to thousands of taxpayers under similar circumstances requires that the question not be left to *ad hoc* determination by juries.

ARGUMENT

The issue in this case can be limited to the taxability of strike benefits paid from the regular strike fund of the International, a fund created by setting aside 25 cents of the regular monthly dues of each member of the entire International.² Not only were the contri-

² The dues were actually paid to the locals, but each local was required to pay to the International a "per capita tax" of \$1.25 per month for each dues-paying member, and 25 cents of that "tax" was then set aside for the strike fund (R. 18).

butions from the Local's separate strike fund³ and other sources⁴ insignificant in amount, but respondent, upon whom the burden lies, failed to establish what part of his payments came from them. They may, therefore, be ignored for purposes of this case.

The International was also the dominant organization in every other respect material here. The strike benefits were not only paid out of its funds but they were authorized by its constitution, paid at the direction of and under terms established by its Executive Board, and payable only if it had authorized the strike and not ordered its termination. In addition, the International was itself independently named (together with the Local) as the bargaining representative of the Kohler employees. We may, therefore, treat the International as the only "union" involved, viewing it as

³ At the beginning of the strike the Local had \$63,677 in its strike fund and the International had \$9,141,488 (R. 20). By the date of the trial (November 1957), the International, administering both funds (R. 20), had given over \$9,000,000 in strike aid to the Kohler workers (R. 58), and at that rate (some \$214,000 per month for 42 months) the Local's fund would have been exhausted in about 9 days. We do not mean to imply that payments coming from the Local's fund would be on any better footing. The assumption that all the payments came from the International is, if anything, probably favorable to respondent, and we make it only because the Local's contribution was in fact *de minimus* and in order to simplify discussion of the basic issue.

⁴ There was testimony that some of the strike benefits came from "contributions from other Local Unions, both the UAW Locals and Locals outside of the UAW, fraternal organizations, and business men and so on" (R. 29, 31). No evidence of the amount of such contributions was offered, however, and there is nothing to indicate that they accounted for a significant part of the total benefits paid.

a single entity representing both the Köhler employees and the employees of other companies, collecting dues from the entire membership, and paying strike benefits directly to the strikers. Whatever the significance of the separate identity of the locals for other purposes, it seems to have none here, and we will refer to the locals only as a convenient means of describing the several units of members comprising the International.

1. STRIKE BENEFITS ARE PAID TO PROMOTE THE ECONOMIC OBJECTIVES OF THE UNION AND CANNOT BE EXPLAINED AS "CHARITY"

Union strike funds and the distribution of strike benefits have so long been a familiar part of our industrial society that their nature and purposes would seem hardly to require extended analysis. Yet underlying the disagreement in this case as to the tax consequences of the receipt of strike benefits are conflicting assumptions as to the fundamental character of these payments. To the court of appeals and respondent, the payment of strike benefits is "consistent only with charity" (R. 62), while to the district court and the Government strike benefits are but a common and accepted instrument for achieving the economic objectives of the union—a characteristic which clearly distinguishes them from the types of charitable contributions and gifts which are excluded by statute from taxable income. Accordingly, perhaps at the risk of appearing to labor the obvious, we think it useful at the outset to undertake an explicit analysis of the nature of strike benefits and the purposes they serve.

- The "purpose" or "intent" of the union in paying

strike benefits is, of course, not that of any particular union official or officials, but the institutional purpose to be inferred from the provisions of the union constitution establishing the strike fund and authorizing its use. We will begin, therefore, with an examination of those provisions and show that strike benefits are paid to promote the economic objectives of the union and cannot properly be treated as "charity." We will show, further, that, in relation to the individual striker, a direct causal relationship exists between his striking and his receipt of benefits.

A. THE UNION CONSTITUTION CREATES AN OBLIGATION TO PAY STRIKE BENEFITS AND SHOWS THAT THE UNION'S PURPOSE IS TO FURTHER THE ECONOMIC INTERESTS OF THOSE IT REPRESENTS

The constitution (R. 17-19) provides that the objects of the union are to "improve working conditions, create a uniform system of shorter hours and higher wages," "protect the interests of workers under [its] jurisdiction," and "improve the sanitary and working conditions of employment" (Art. 2). To that end the union pledges itself, when negotiations "fail to establish justice for the workers," to "advocate and support strike action" (*ibid.*). A "Strike Fund" is to be created by setting aside 25 cents out of each month's dues of each member^{*} and is to be used, at the direction of the Executive Board, "exclusively for the purpose of aiding Local Unions engaged in authorized strikes" (Art. 16, § 11). If a strike has been approved by the Executive Board, "it shall be the duty of the * * * Board to render all financial assistance to the members on strike consistent with the

^{*} See note 2, *supra*.

resources and responsibilities of" the union (Art. 12, § 15).⁶ Workers engaged in an unauthorized strike "shall have no claim for financial or organizational assistance" and "all assistance * * * shall cease" when an authorized strike has been ordered terminated by the Board (Art. 49, §§ 5-6).

Those provisions show, in the first place, that strike benefits are paid pursuant to what is essentially a contractual obligation. The constitution is the basic contract among the members, and the strike fund provisions constitute an agreement among them to support each other's strikes by contributing to a common fund to be used to pay strike benefits in authorized strikes. The payment of strike benefits when the occasion arises is, therefore, essentially the satisfaction of a contractual obligation⁷ undertaken for a *quid pro quo*—the mutual obligations running to each member.⁸ Clearly, of course, the obligation runs only to members, but the obligation to them is to support the entire strike—i.e., by benefit payments to nonmembers who participate in the strike as well as to members. In contract terms, the nonmembers are essentially third-

⁶ While this seems to contemplate primarily payments to union members, we may accept the union's construction of the constitution as authorizing payments to striking nonmembers as well (R. 23).

⁷ Whether the obligation is legally enforceable or not is, we think, not controlling. Even if the Executive Board, because of the discretion given it, could not be forced to give strike benefits in a particular case, the strike fund can be used only for those purposes.

⁸ With the union interposed as a separate entity to and from which the obligations flow (rather than as mutual obligations among the members), the *quid pro quo* takes the form of the dues paid for the uses provided in the constitution.

party beneficiaries of the obligation, made so because of the obvious advantage to the members of encouraging nonmembers to support them in a strike: nonmembers would soon become disaffected with a union-called strike were they discriminated against by the union in giving benefits.

As we shall later show (pp. 26-33), however, we need not rely on there being a contractual obligation to pay strike benefits, since it is enough that the union's purpose in paying them is to further the economic interests of those it represents. That that is in fact the purpose of the strike fund provisions is indicated in the constitution in several ways: (1) improvement of terms and conditions of employment is the stated object of the union as a whole and there is nothing to indicate that the strike fund provisions have some different purpose; (2) the fact that the strike fund comes out of regular dues suggests, to the contrary, that its purposes are the same as those for which dues are generally paid; (3) the reference to "aiding Local Unions engaged in" strikes (Art. 16, § 11) suggests primarily aiding the locals to win strikes, not relieving hardship as an end in itself; and (4) the limitation of strike benefits to authorized strikes indicates that they are a means for achieving approved union objectives.

Those clear implications of the constitution can be rejected, we think, only if, as the court of appeals

* Compare the letter from the International to the local unions in 1952 which explained that the strike fund has been established "to further assist Local Unions in winning current strikes and to build a fund to protect our members in any future strikes" (R. 22).

seemed to think, there is no reasonable explanation of how the strike fund does in fact further the economic objectives of the union, thus making it necessary to attribute some other purpose to the payment of strike benefits. We will show, however, that the payment of strike benefits can be fully explained in terms of those objectives and that, quite the reverse, the charitable purpose attributed to the union by the court of appeals is itself inconsistent with the terms on which they are paid.

B. THE PAYMENT OF STRIKE BENEFITS FURTHERS UNION OBJECTIVES

1. Since a strike is the ultimate weapon of the union to achieve its economic demands, strike benefits further the economic aims of the union if they strengthen the strike and contribute to its success. That they do follows from no more than the evident fact that, after a period of striking, strikers who have received at least subsistence support from the union will be more willing and better able to continue the strike than would strikers who had received no aid during that period. It is immaterial that the employees are not induced to strike solely, or even largely, by the prospect of strike benefits (or even, if true, that they have no expectation of strike benefits at all) or that no promise to continue striking is exacted in exchange for the benefits. Obviously employees are induced to strike and continue striking primarily by their own self-interest and their loyalty to the union cause, and not by the prospect of receiving strike benefits. Nevertheless, the degree of economic hardship suffered in the strike is inevitably one of the factors affecting the

will and the ability of the strikers to continue rather than capitulate to their employer's demands, and to that extent strike benefits, by alleviating the hardship to some degree and thus making it possible (or at least easier) for the employees to continue striking, necessarily operate to strengthen the strike.¹⁰

Not only does that function of strike benefits fully explain why strike benefits are given only to strikers and why no distinction is made between members and nonmembers, but it makes apparent the reason why the payments are conditioned on need: it is the strikers in need who have suffered the greatest hardship in the union's cause and who particularly require financial support to be able to remain on strike.

2. It may be suggested that the great bulk of the strike fund came, not from the Kohler employees, but from the dues paid by members of other locals who had no direct interest in the outcome of the Kohler strike and whose purpose in contributing the funds given the Kohler strikers could not, therefore, have

¹⁰ Moreover, even if strike benefits had no effect at all upon the conduct of the strikers, but were given solely for the purpose of relieving the hardship already suffered, we think they would still be directly related to the furtherance of union objectives: such payments would be but a recognition that the hardship suffered in supporting the strike at the union's request is one of the costs of achieving the union objectives and ought to be borne in part out of union funds. Voluntary assumption of part of the burden of past participation in the strike is no less related to the furtherance of union objectives, we think, than payments designed to encourage future participation. Such payments would surely, for example, be a justifiable use of union funds dedicated to promoting the objectives of the union, and for the same reason should be treated as being made for a union purpose.

been to further their own economic interests and can be explained only as charity. So to fragmentize the interests of the several locals, however, is to deny the very reason for the existence of the International: namely, that, as the history of the labor movement has taught and the increasing amalgamation of unions evidences, the interests of the several units are interdependent and, since no single unit can achieve wage levels greatly out of line with the rest of the industry, each unit has an interest in the gains of another. So also, the very reason for having an International strike fund is that the consolidation of their resources is to the advantage of all the units, not only by helping each unit win its strike when it occurs, but also because the existence of a large strike fund strengthens the bargaining position of the union in bargaining for all of the units.

C. THE PAYMENT OF STRIKE BENEFITS CANNOT BE EXPLAINED AS
"CHARITABLE"

Not only are strike benefits not consistent "only with charity", as the court of appeals held, but, we believe, they are not consistent with charity at all—unless, of course, the object of furthering the members' own economic interests is itself to be deemed a charitable one (see pp. 42-46, *infra*).

While the single qualification of need is as consistent with charity as with a purpose to further union objectives, some account must be taken of the other limitations imposed by the constitution. The basic difficulty with the charity hypothesis is that it in no way explains why the use of the "charitable" fund is

limited to strikers, only strikers represented by the union, and only if the strike is authorized by the union—or why the “charity” is shut off if the strikers do not obey the orders of the Executive Board to terminate the strike. While “charity” can no doubt be dispensed to a limited class, it loses that quality, we think, when the class is defined by conditions explicable only by their contribution to the economic objectives of the payor.¹¹

“Charity,” moreover, usually arises as a response to a need independently or autonomously incurred. The need alleviated by strike benefits, however, is one incurred at the request of the union itself and to further union objectives. It is at the very least an unusual sort of charity that is confined to relieving hardship suffered at the payor’s direction to promote the payor’s objectives. Nor is the union’s response to the need spontaneous, as the court of appeals seemed to assume. Rather it is in execution of a constitutional provision by which all the members agreed to contribute to a fund for their mutual support, with each member-contributor having equal prospects of being the ultimate recipient.¹²

¹¹ The fact that no aid is given union members unemployed for other reasons (R. 58) also makes it difficult to explain strike benefits as being prompted by personal sympathy for the strikers rather than sympathy for the common cause the strikers are promoting. The members of a nonstriking local could be expected to feel a more immediate sympathy for the unemployed members of their own local than for strangers (even nonmembers) temporarily unemployed by reason of a strike of another local.

¹² As to payments received by nonmembers, see pp. 17-18, *supra*.

Finally, a charitable impulse also seems an unrealistic explanation of why the members would agree to the strike fund provisions in adopting the constitution. The fact that the members had common economic interests which they believed could be better served by joint action (surely the main reason for forming the union) is no reason to assume that they had common charitable interests to which they also gave joint expression. To the contrary, none of the advantages of concerted action in achieving economic goals seems to have any application to joint charitable giving. Thus, rather than commit himself to a monthly contribution to a charitable fund administered by the group, each member might be expected to reserve to himself control over his dispensation of charity. Nor does it seem reasonable to suppose that the union would want to exact charitable contributions as a condition of employment from those required to join the union and pay dues under a union shop contract. The justification for requiring all employees in a union shop to pay dues is that it is reasonable that they should share the cost of union activity from which they gain economic benefits (see *Railway Employees' Department v. Hanson*, 351 U.S. 225); enforced contributions to charities not of their own choosing could not be so justified. In short, only if the strike fund furthers the economic objectives of the union does it seem likely that the members adopting the constitution would have been willing to commit themselves, and other less willing members, to make monthly contributions to it.

D. FROM THE EMPLOYEE'S POINT OF VIEW, STRIKE BENEFITS MAY BE
CHARACTERIZED AS A RECEIPT "FOR" STRIKING

We have thus far considered strike benefits only from the point of view of the payor—the aspect which, we believe, should control their tax characterization. We shall also, however, briefly examine them from the point of view of the recipient.

1. We may concede that an employee need not promise to continue on strike or undertake to perform active duties, such as picketing, to receive the payments. We may also, for the moment, concede that he does not, by striking, acquire a "right" to receive strike benefits. Even so, the causal relationship between the employee's striking and his receipt of benefits is, we believe, so direct as to require a characterization of his receipts as being "for" striking.

The relationship between the employees and the union antedates and survives the payment of strike benefits. The union is the employees' representative and in striking the employees act not individually (though each may anticipate a personal gain) but in concert under its leadership and direction. Starting from that relationship, the chain of causation becomes clear: the union, to further union objectives, calls a strike; the employees, as they are expected to, comply with that request; the union gives financial assistance to those who incur a hardship by doing so; relief of their immediate needs makes it possible for the employees to continue striking; their continued participation strengthens the strike and furthers the union objectives for which it was called. In short, the employee strikes because called upon to do so by

the union; the union gives him strike benefits because he is striking; and he continues to strike in part because he is receiving strike benefits. No amount of emphasis on the qualification of need can destroy that causal relationship, which, we believe, is as great as it is possible to be without there being a bargained-for contractual exchange. Unless the latter is always to be an essential prerequisite, the relationship here must be sufficient to characterize the employee's receipt of the benefits as being "for" his performance of a desired act—*i.e.*, being on strike."

2. Moreover, as noted above (pp. 17-18), the union does in fact have an express contractual obligation to give strike aid to employees participating in an authorized strike. Whether that obligation is legally enforceable or not is irrelevant, for it operates in any event to complete the causal relationship between the employee's striking and his receipt of the benefits.

II. STRIKE BENEFITS ARE NOT EXCLUDIBLE FROM INCOME EITHER AS GIFTS OR OTHERWISE

A. STRIKE BENEFITS ARE NOT GIFTS

From the foregoing analysis of strike benefits there appear at least four different elements which pre-

"We do not contend that the existence of a qualification which must be met to receive a payment in itself requires a characterization of the payment as being "for" the performance of the qualifying act. Obviously, the usual charitable distribution to the needy is not a payment "for" being in need, and no doubt a disinterested charitable organization could make payments limited to strikers without justifying a characterization of the payment as being "for" striking. The crucial difference here is that the qualifying act was performed at the request of, and is of benefit to, the payor.

clude their characterization as "gifts." Under our view of the proper definition of gifts for purposes of the exclusion, any one of those elements would by itself be sufficient to make the payments taxable. We propose further to show, however, that the presence of some of those elements would preclude characterization as a gift under any of the decided cases.

1. *Because not made "out of affection, respect, admiration, charity or like impulses"*

Our primary position is that it is sufficient by itself to preclude characterization of strike benefits as gifts that they were paid for a "business" reason or justification (the promotion of union objectives) and not out of affection, charity, or other recognized "gift reason." It is at this level of the concept of a gift for tax purposes that there seems to exist the greatest divergence of view among the lower courts, with some courts seemingly adopting the view that a payment may be a gift even though made for business reasons.¹⁴

¹⁴ See, e.g., the cases holding (under the 1939 Code, but see § 74 of the 1954 Code) that advertising campaign give-aways are nontaxable gifts. *Glenn v. Bates*, 217 F. 2d 535 (C.A. 6); *Campeau v. Commissioner*, 24 T.C. 370; *Washburn v. Commissioner*, 5 T.C. 1333; *Fernandez v. Fahs*, 144 F. Supp. 630 (S.D. Fla.). Plainly in those cases the payor makes the payment solely for business reasons, and the fact that the recipient has done nothing in return for it means at most that to him the payment is a "windfall", not that it is a gift. Probably the most accurate explanation of those cases is that the courts viewed windfalls as not being within the concept of gross income, but that rationale too has been rejected by this Court. See *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, discussed pp. 39-40, *infra*.

- * Also in this category are the cases holding to be gifts: payments by a corporation to the widow of a deceased executive in recognition of his services (e.g., *Bounds v. United States*, 262

The decisions of this Court, however, with one exception that we believe has since been discredited, are uniform in defining as a gift only that which is prompted by personal regard, generosity, compassion, or charity.

In *Bogardus v. Commissioner*, 302 U.S. 34, the Court held to be a gift a payment made by "an act of 'spontaneous generosity' " (p. 42) for which there was "entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act" (p. 41); the dissenting opinion in turn characterized a gift as a payment made "to show good will, esteem, or kindness" toward the recipient (p. 45). In *Robertson v. United States*, 343 U.S. 711, 713-714, the Court more

F. 2d 876 (C.A. 4); *Hellstrom v. Commissioner*, 24 T.C. 916; and cases cited in Jennings, *Voluntary Payments to Widows of Employees*, 37 Taxes 531, 534, n. 8); pensions paid out of church funds to retiring ministers (*Mutch v. Commissioner*, 209 F. 2d 390 (C.A. 3); *Schall v. Commissioner*, 174 F. 2d 893 (C.A. 5); *Abernethy v. Commissioner*, 211 F. 2d 651 (C.A.D.C.); and *Hershman v. Kavanagh*, 120 F. Supp. 956 (E.D. Mich.), affirmed, 210 F. 2d 654 (C.A. 6)); a pension paid to a department store employee retired for old age (*Peters v. Smith*, 221 F. 2d 721 (C.A. 3)); and a gratuity given by a corporation to one who had given it information which proved valuable (*Dubenstein v. Commissioner*, 265 F. 2d 28 (C.A. 6), petition for a writ of certiorari pending, No. 376, this Term). In all those cases, we submit, there was an obvious business justification for the payment, without which in fact the payment would have been a misuse of corporate funds. That is true even in the minister cases: while it may be that the members of the congregation feel love and affection for the retiring minister, the pension is paid not by them but out of the regular church funds dedicated to religious purposes, and as to the church the payments can be justified only as giving a faithful servant his due.

specifically alluded to a gift as a payment "given not for services * * * but out of affection, respect, admiration, charity or like impulses." Finally, in *Commissioner v. LoBue*, 351 U.S. 243, 246, the Court summarily rejected a suggestion that stock options given employees might be gifts, noting that there was no indication "of the kind of detached and disinterested generosity which might evidence a 'gift' in the statutory sense." Whether the options were intended as "compensation" or not was irrelevant; it was enough that there was a business purpose for giving them—in that case, to give the employees an interest in the business and thereby increase their incentives to contribute to its success.

Those cases, although admittedly involving facts very different from those here, establish, we believe, that to be a gift it is not enough that a payment is gratuitously made in the sense that there is no legal consideration, and that whether a voluntary payment is a gift or not depends on the reasons why it is given. If it is given out of "spontaneous" or "detached and disinterested" generosity, "kindliness," "affection, respect, admiration, charity or like impulses," without thought of advantage to the payor, it is a gift; if, however, it is made for a business reason, as in *LoBue*, then whatever else it might be (i.e., whether or not it can be characterized as compensation for services), it is not a gift.

It must be admitted that there is one decision of this Court, *Helvering v. American Dental Co.*, 318 U.S. 322, which seems to adopt a very different concept of gifts. In that case, the creditors of a corpora-

tion accepted partial payment and cancelled the balance of the indebtedness, doing so, as the Board of Tax Appeals found, "for purely business reasons" and not for "altruistic reasons or out of pure generosity" (p. 330). This Court held that the cancellations were nevertheless gifts, defining a gift simply as "the receipt of financial advantages gratuitously" (p. 330). The Court apparently meant that any benefit conferred without obligation or consideration, regardless of the payor's motives, was a gift, for it added (p. 331):

* * * The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute.

We submit, however that that decision is no longer of value as precedent. Even on the precise question involved—cancellation of indebtedness—it was severely limited to its precise facts, if not overruled (see p. 52), by *Commissioner v. Jacobson*, 336 U.S. 28. And not only does none of the later cases reaffirm the *American Dental* concept of gifts, but their statements of the nature of a gift seem squarely opposed to that concept. See particularly *Robertson* and *LoBue*, *supra*.

If, as we contend, the implications of *American Dental* have been rejected and it is not true that any payment made without obligation and not in return for a specific consideration is a gift, then the distinc-

tion between those that are and those that are not must turn on the reason why the payor makes the payment. While there still remains the problem of defining which reasons require one characterization and which the other, *Bogardus*, *Jacobson*, *Robertson*, and *LoBue* establish, at the very least, that a purpose to further the payor's own economic interests prevents a gift characterization.

Because of the presence of the additional elements discussed below that would make strike benefits taxable in any event, the foregoing contention is not essential to our position in this case. It may, however, assume a much greater importance in other areas of the gift-income problem—*e.g.*, the taxability of "gratuities" given departing employees or in return for business favors"—and we have emphasized it here in order that our reliance on the additional distinguishing elements of strike benefits not be understood as implying that those elements are an essential prerequisite to taxability. In our view, strike benefits are taxable simply because there is a business justification for their payment, and the additional elements discussed below are only further reasons why they are not gifts.

2. *Because of the anticipated benefit to the union by encouraging continuation of the strike in support of union objectives*

A payment could be given for a business reason even though the payor anticipated no prospective benefit from the payment.¹⁵ An additional element

¹⁵ See *Petition for a Writ of Certiorari, Commissioner v. Duberstein*, No. 376, this Term.

¹⁶ See, for example, the facts suggested in note 10, *supra*. Under those facts, the "business justification" for the payment

here, as we have seen, is that the union does realize a specific prospective benefit from the strike benefits: their payment makes it possible for the strikers to continue on strike in support of the union's economic objectives. Whatever may be the effect of other kinds of business reasons for a payment, it is clear that a payment induced by the anticipation that it will produce an economic benefit for the payor is not a gift. *Commissioner v. LoBue*, 351 U.S. 243, 246; cf. *Bogardus v. Commissioner*, 302 U.S. 34, 41, noting that the payment there held to be a gift lacked "the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act".

3. *Because given in exchange for the recipient's performance of acts requested by and of benefit to the union*

As *LoBue* clearly teaches, compensation for services is only one category of taxable income and it is not necessary to characterize a payment as compensation in order to conclude that it is not a gift." For example, a payment made for an anticipated benefit would not be a gift even though the benefit flows from someone other than the recipient of the payment, who, therefore, could not be said to be receiving compensa-

would, under our first contention, preclude characterizing the payment as a gift even though the union anticipated no prospective benefit from the payment.

"The error of accepting such a dichotomy may help to explain the widow-bonus cases (see note 14, *supra*), where it is frequently emphasized that the widow herself had performed no services for which she could be "compensated" and that the deceased officer had been adequately compensated for his services prior to his death.

tion for his services.¹⁸ Thus the fact that strike benefits are given in exchange for acts performed and to be performed *by the recipients*, and are therefore properly to be characterized as compensation for their services, affords a further and independent reason why they are not gifts.

The analysis of strike benefits in Point I of this brief makes clear, we believe, the direct causal relationship between an employee's striking and his receipt of benefits. On the one side, the employee participates in the strike at the request of the union; it is only by his participation that he qualifies for the payments; and his receipt of strike benefits is one of the inducements for him to continue striking. On the other side, the union is receiving the benefit of the employee's support of the strike called by it to further its economic objectives; it makes payments only to those from whom it has received such benefits; and in making the payments it hopes to encourage the recipients to continue to perform the desired acts. That interdependence between the recipient's performance of an act requested by the payor and his receipt of a payment from the payor permits of no other characterization, we submit, than that the payment is given "in exchange for" the performance of the act and thus constitutes compensation within the meaning of § 61(a) (1) of the Code (p. 2, *supra*). The additional requirement that the striker be in need of financial aid

¹⁸ An example might be a payment made to a disabled employee, not because of the value of his past services, but solely for the purpose of creating good will toward the employer among the other employees.

means only that his right to compensation is subject to a further condition and not that it is not compensation. But even if the qualification of need be thought to preclude characterizing the benefits as "compensation," it does not destroy the underlying relationship between the employee's striking at the request of the union and his receipt of the payment and that relationship, however characterized, prevents the payment from being a gift.

4. *Because paid pursuant to an obligation that was not itself created by way of a gift*

The final reason that the strike benefits paid here were not gifts is that they were paid pursuant to an obligation—i.e., pursuant to the "contract" among all the union members (the constitution) whereby they agreed to contribute to a fund to be used to support each other's strikes (see pp. 17-18, *supra*). Obviously, of course, the fact that a payment is made pursuant to an obligation does not preclude its being a gift if the obligation itself was created by a gift. Thus no one would contend that distributions by a charitable trust are not gifts because the trustee was under a legal duty to carry out the terms of the trust. But if the creation of the obligation was not itself a gift, then clearly payments pursuant to the obligation are not. *Robertson v. United States*, 343 U.S. 711; *Bogardus v. Commissioner*, 302 U.S. 34, 41.

Here the obligation having been created in exchange for a *quid pro quo*—the payment of dues by the members—its satisfaction cannot be a gift. And that is equally true as to nonmembers, who were

made third-party beneficiaries of the obligation running to the members not out of generosity but because of the value to striking members in having nonmembers support their strike (see pp. 17-18, *supra*). In short, strike benefits were given to respondent, even during the period before he joined the union, simply to carry out the agreement among the members, for their mutual benefit, to aid employees engaged in authorized strikes. Whether or not the obligation thereby created and imposed upon the Executive Board by the constitution was legally enforceable, it was the duty of the Executive Board to comply with it in good faith and its action in doing so cannot be deemed the making of gifts.¹⁹

¹⁹ If in fact not legally enforceable, the duty to pay strike benefits might be described as a "moral obligation", but, if it is, care must be taken to distinguish it from other very different concepts given the same label. It is possible, for example, to say that a payment made to an employee's widow (see note 14, *supra*) is given in recognition of a "moral obligation" to the employee and his family, meaning only that under current business mores it is felt that a business "ought" to provide for the dependents of a faithful employee. While that accepted scope of a business' "responsibilities" might be enough to justify payment out of corporate funds—and, we think, to provide a "business reason" for such a payment precluding its characterization as a gift (see pp. 26-30, *supra*)—it involves an "obligation" of a very different order from that which is fulfilled by performance of an express agreement which might, for one reason or another, be technically unenforceable. Whatever the effect of a "moral responsibility" of the sort recognized by a payment to an employee's widow, we think it clear that, for tax purposes, nothing should turn on whether an express contractual undertaking fully performed by the parties would have been legally enforceable had the parties not performed it.

B. NONE OF THE AUTHORITIES RELIED UPON BELOW SUPPORTS THE
CHARACTERIZATION OF STRIKE BENEFITS AS GIFTS

1. The sole basis for the court of appeals' decision was its holding that strike benefits are "charity." The only authorities cited to that point held nontaxable various forms of public welfare payments (social security, unemployment compensation, and relief), Red Cross disaster aid, and rehabilitation payments made by an employer to employees who were victims of a tornado disaster (R. 60).

Since the essence of charity is its public character and the absence of personal advantage to the payor, public welfare payments by governmental units are perhaps the purest form of "charity" and obviously must be treated as gifts for income tax purposes.²⁰ That Red Cross disaster aid is equally a charitable gift is likewise undebatable.

Those cases, however, prove only the obvious—that charitable payments are gifts—and in no way show that strike benefits are charitable payments. The classic definition of a charitable gift is that given in *Ould v. Washington Hospital*, 95 U.S. 303, 311:

²⁰ The fact that legislatures must act by statute, and the recipients may therefore receive their benefits as a "matter of right" under the statute, does not change the quality of the payments; the question is whether the creation of the statutory right was charitable in nature.

Nor, we think, does it make a difference that social security is financed in part by a tax upon the employer. As we show in our brief in *Flemming v. Nestor*, No. 54, this Term, pp. 59-70, there is no direct relationship between the payment of taxes and the receipt of benefits. Social security is no different from any other public gratuity, and the transaction that is taxed to finance it is essentially irrelevant.

Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish.

As our analysis of the nature of strike benefits makes clear (see particularly pp. 21-23, *supra*), strike benefits are paid to further the objects of the union, and that element of self-interest necessarily deprives them of the essential quality of charity.

The ruling by the Commissioner that rehabilitation aid given by an employer to employees who were the victims of a tornado is not taxable²¹ is more difficult to rationalize, and seems to be based on the theory, not that the payments were gifts, but that, since the object of the payments was simply to make the employees whole by replacing the casualty losses, the employees realized no gain.²² Whatever the difficulties of that rationale, it gives respondent no support here. The loss alleviated by the employer there was a casualty loss caused by an act of God; that allevi-

²¹ Rev. Rul. 131, 1953-2 Cum. Bull. 112.

²² The payments were limited to losses not compensated by insurance; the ruling required that any casualty loss deductions by the employees be reduced to the extent that such losses were replaced by the payments; and it was held that any rehabilitation payments used to repair tornado damage could not be added to the basis of the property. Were the payments treated as "gifts", they would not have affected the casualty loss deductions and would have increased the basis of any property on which they were expended. It can be said, in fact, that the net effect of the ruling is to treat the payments as taxable receipts which are, however, offset by the casualty losses.

ated here was the loss of taxable wages. Obviously compensation for loss of income is itself income. See *United States v. Safety Car Heating Co.*, 297 U.S. 88; *LaPointe v. Commissioner*, decided June 10, 1943, 1943 P-H Tax Ct. Mem. Dec. ¶¶43,278, 43,289; Rev. Rul. 58-140, 1958-1 Cum. Bull. 15. More importantly, the hardship relieved by strike benefits is one incurred at the request of the union and to further union objectives; not a loss caused by an event beyond the control of, and of no benefit to, the payor.

2. Other authorities cited to the court below,²³ but not referred to in its opinion, are equally distinguishable.

Payments on account of services received by the payor in the past—widow bonuses and pensions to retired ministers or employees²⁴—lack the elements present here of a prospective benefit to the payor from the payment, the current performance by the payee of acts beneficial to the payor, and the express agreement undertaken by the payor for a *quid pro quo* to make the payments. Thus cases holding such payments to be gifts, even if correctly decided (but see pp. 26-30, *supra*), have no relevance here. The same is true of the early cases, of dubious validity today, holding to be a gift the payment of interest on a debt that had not been contracted for and hence was not legally due²⁵ and a payment to a contractor in excess of the contract price to compensate him for an increase of

²³ Primarily in the Brief for the AFL-CIO, *Amicus Curiae*.

²⁴ See note 14, *supra*.

²⁵ *Chase v. Commissioner*, 19 B.T.A. 1040.

costs occasioned by a delay in performance requested by the buyer.²⁶

Similarly, in the advertising campaign give-away cases,²⁷ nothing was done by the recipient of benefit to the payor, as in this case. The ruling that political contributions are not income to the candidate²⁸ has no analogy here; such funds are not received by the candidate to his own use but are impressed with a trust and can be used only in the campaign. The nontaxability of a state's reimbursement to an official of the cost of defending his official actions in litigation²⁹ is similarly based on the ground that the recipient realized no gain.

3C. IF NOT WITHIN THE GIFT EXCLUSION, STRIKE BENEFITS ARE TAXABLE GAINS

The court of appeals based its decision on what it treated as two separate grounds, holding that strike benefits were both (1) not within the definition of "gross income" in § 61(a); and (2) excludible "gifts" within the meaning of § 102(a). Since both holdings were based on the court's conclusion that strike benefits were "charity", the invalidity of that characterization, which we have sought to show above, under-

²⁶ *Rice, Barton & Fales v. Commissioner*, 41 F. 2d 339 (C.A. 1). The opinion in that case relies primarily on the definition of income in *Eisner v. Macomber*, 252 U.S. 189, as limited to receipts from specified sources, a concept that has since been rejected by this Court. See pp. 39-40, *infra*.

²⁷ See note 14, *supra*.

²⁸ I.T. 3276, 1939-1 Cum. Bull. 108.

²⁹ *Cox v. Kraemer*, 88 F. Supp. 835, 837 (D. Conn.): "the payment was not an additional requital for services . . . [but] a grant to replace capital impaired by what the legislature considered a wrong done by a former administration, in connection with plaintiff's employment."

mines both holdings. It may be helpful, however briefly to examine the relationship of the two supposedly independent questions.

1. In the early development of the meaning of "gross income", emphasis was placed on the source of the gain, and the famous definition in *Eisner v. Macomber* seemed to limit income to "gain derived from capital, from labor, or from both combined." 252 U.S. 189, 207. However, by a process of evolution that need not be detailed here,³⁰ the limitation on the sources of taxable receipts was gradually abandoned. The decision in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, reflects the culmination of that development.

The issue in *Glenshaw Glass* was whether punitive damages received for fraud and antitrust violations were taxable. The taxpayer contended that it was simply the fortuitous beneficiary of a penalty imposed upon the payor for his culpable conduct to vindicate public policy, and thus that the receipt was essentially a "windfall" to it not within the *Eisner v. Macomber* definition of a gain derived from "capital" or "labor." The Court, accepting the taxpayer's characterization of the receipt, held that it was nevertheless taxable. *Eisner v. Macomber*, the Court noted, was concerned only with the problem of realization and was never "meant to provide a touchstone to all future gross income questions" (p. 431). Emphasizing that the statutory definition of gross income

³⁰ For a full study of the development, see Wright, *The Effect of the Source of Realized Benefits upon the Supreme Court's Concept of Taxable Receipts*, 8 Stan. L. Rev. 164.

included all "gains or profits and income derived from any source whatever,"³¹ the Court concluded that Congress imposed "no limitations as to the source of taxable receipts, nor restrictive labels as to their nature," and intended "to tax all gains except those specifically exempted" (pp. 429-430). Since the punitive damages, however else they might be characterized, were undeniably "accessions to wealth" which were fully "realized" (p. 431), and were not within any express exemption, they were includible in gross income.³² See also *Commissioner v. LoBue*, 351 U.S. 243, 246.

Glenshaw Glass, we think, clearly holds that the only "gross income" question is whether there has been a realized gain; if so, it is taxable unless excluded by one of the express exemptions. Respondent here admittedly realized a "gain" from his receipt of the strike benefits, and hence the only remaining question is whether the payment is within the gift exclusion (the only express exemption claimed to be applicable), the question considered above.

2. Notwithstanding *Glenshaw Glass*, the court below was of the view that a realized gain was not necessarily includible in gross income even if it was not within a specific exemption, citing numerous rulings of the

³¹ § 22(a) of the 1939 Code. As the Court noted, the simplification of the language of the gross income definition in the 1954 Code (§ 61(a)) by eliminating "gains or profits" and referring only to "income from whatever source derived" was not intended to affect its scope. 348 U.S. at 432.

³² In a companion case, *General Investors Co. v. Commissioner*, 348 U.S. 434, the Court held taxable, for the same reason, "insider profits" paid over to a corporation under § 16 (b) of the Securities and Exchange Act.

Commissioner claimed to support that view. Many of the rulings cited, however, involved payments that were clearly exempt as gifts—social-security benefits, unemployment compensation, public relief, and Red Cross aid (see p. 35, *supra*). That the rulings involved stated only that such payments were not taxable income, without expressly saying that they were “gifts”, hardly makes them authority for so fundamental a proposition.

The other rulings cited turn on whether the taxpayer realized a “gain” at all, a question involved neither in *Glenshaw Glass* nor here. Thus the rationale for not taxing compensatory damages recovered for personal injuries, as the Court noted in *Glenshaw Glass* itself (348 U.S. at 432, n. 8), is that the recoveries “roughly correspond to a return of capital”—i.e., they simply return the injured plaintiff to his former state and do not represent gain. See *Hawkins v. Commissioner*, 6 B.T.A. 1023. The same rationale underlies the rulings that recoveries for other kinds of injuries to personality are not taxable: damages for breach of promise to marry (G.C.M. 4363, VII-2 Cum. Bull. 185 (1928); I.T. 1804, II-2 Cum. Bull. 61 (1923)³³); damages for wrongful death (I.T. 2420, VII-2 Cum. Bull. 123 (1928)); and payments to war prisoners for mistreatment by their captors (Rev. Rul. 55-132, 1955-1 Cum. Bull. 213). As we have noted above (p. 36), the ruling that rehabilitation payments by an employer to victims of a tornado are not

³³ The court below cites this ruling as involving damages for alienation of affections (R. 60), but the subject matter appears to have been damages for breach of promise to marry.

taxable similarly rests on the theory that no gain has been realized. Whatever the merits of those rulings, which are not in issue here, they hold only that such payments did not result in a "gain" and do not support the court's view that a payment which is admittedly a realized gain may nevertheless be without the scope of the "gross income" definition.

3. Finally, strike benefits would, we submit, qualify as income even under the *Eisner v. Macomber* definition. Since an employee must participate in the strike in order to qualify for the payments, the gain, if not a gift, is clearly one "derived from" his participation in the strike and can properly be characterized as "compensation" for his striking (see pp. 32-33, *supra*). And even *Eisner v. Macomber's* reference to a "gain derived from * * * labor" cannot be read so literally as to exclude a gain derived from refraining from labor.³⁴ It is enough to satisfy the definition that respondent performed acts requested by the union and became entitled to the payment only by doing so.

D. NOTHING IN THE NATURE OF A LABOR ORGANIZATION JUSTIFIES
SPECIAL TREATMENT OF STRIKE BENEFITS

We have seen that the purpose of strike benefits is to encourage continued participation in the strike and that the recipient's participation "benefits" the union

³⁴The cases holding that payments for a covenant not to compete are taxable establish as much. *Salvage v. Commissioner*, 76 F. 2d 112, 113 (C.A. 2), affirmed on other grounds, 297 U.S. 106; *Beals' Estate v. Commissioner*, 82 F. 2d 268, 270 (C.A. 2). We rely on those cases only for the proposition that payments in exchange for refraining from labor are within the concept of gross income. Since they involved express contracts, they are not relevant to the gift issue discussed earlier.

by furthering the objects for which it was created. In any other context, we think there would be little doubt that payments bearing the same relationship to the payor's self-interest would be taxable. If strike benefits are not taxable, therefore, it must be for some reason peculiar to a labor organization or based on the nature of its objectives. If, for example, the purpose of the union in winning improved working conditions for the employees were itself to be deemed "charitable", then strike benefits paid in support of that object might also be deemed charitable. In our view, however, there is nothing in the nature of a union or its objects, though admittedly unique, that justifies such special treatment.

While a union may serve other needs and aspirations of its members, it cannot be denied that its primary goal is to promote the economic interests of those it represents by obtaining for them better terms and conditions of employment.²⁵ While not profit-making itself,²⁶ its end is to profit those it represents, and in that sense it is not essentially different from any business entity performing an economic service for its subscribers.

The "business" function of a union is recognized most distinctly, perhaps, by the treatment, for various purposes, of dues paid a union as being essentially fees paid for a business service. As we have previously noted (p. 23, *supra*), for example, it is on that ground that legal sanction has been given to the union shop contract and the exaction of dues from

²⁵ A sufficient reason for not taxing the union itself on its income. See § 501(c)(5).

unwilling members: the union's services are of economic benefit to all the employees and it is deemed just that they equally contribute to their cost. See *Railway Employees' Department v. Hanson*, 351 U.S. 225. More significant for present purposes, however, is the treatment of dues for tax purposes.

The Commissioner has long recognized that union dues are a legitimate cost of the production of income and, as such, are deductible by the member as ordinary and necessary business expenses. O.D. 450, 2 Cum. Bull. 105 (1920) (dues); I.T. 2888, XIV-1 Cum. Bull. 54 (1935) (dues and assessments for benefits to unemployed members); I.T. 3634, 1944 Cum. Bull. 90 (initiation fees); Rev. Rul. 57-383, 1957-2 Cum. Bull. 44. Those rulings are premised upon the relationship of the union's activities to the "trade or business" (i.e., employment) of the members. As the Commissioner, likening a union to a business association, noted in I.T. 2888, *supra*, "the deductibility of contributions or payments to an organization of business associates depends upon the relation of the purpose or use of such funds to the business of the contributor" (p. 56).

If the purpose for which union funds are used is to be deemed a "business" purpose in allowing deduction of contributions to those funds, consistency requires that expenditures of union funds for the very purposes for which they were contributed likewise be deemed "business" expenditures in determining taxability to the recipient. That can be graphically demonstrated by assuming a case in which there is a complete identity between the contributors to the

strike fund and the recipients of strike benefits: for example, where a small union with unchanging membership collects dues and accumulates a strike fund for many years and then, having called a strike for the first time, pays out strike benefits to its members. The contributions to the strike fund by the members were deemed for a business purpose and hence deductible. If the payment of strike benefits is not deemed equally for a business purpose and hence taxable, it may be seen that the net result is to permit ordinary wages to escape taxation: when earned by the members, the wages paid over as union dues, being deductible, were not taxed, and they are still not taxed when returned to the members as strike benefits.

The principle is no different where a large union is involved and tracing of the dues is impossible, or even where strike benefits are paid to nonmembers who have paid no dues. The significant point is that the strike fund itself consists, as it were, of untaxed wages (*i.e.*, contributions that were deductible by the wage-earning members and hence reduced the income taxable to them)²⁶ which will not be taxed at all unless taxed when paid out as strike benefits. Our con-

²⁶ We recognize that many union members undoubtedly do not itemize their deductions but elect instead the standard deduction, so that in fact the payment of dues does not increase their total deduction. In theory, however, the standard deduction represents the deductible items in lieu of which it is taken and is provided only to relieve the taxpayer of the necessity for itemization. Hence that election does not change the basic characterization of dues as being a business expense. Moreover, we are not here concerned with whether dues are in fact deducted. Our point is that the *reasons* why contributions to

tention is not that particular dollars should be traced through the strike fund, but rather that the characterization of the strike fund should be the same for both purposes. If it is considered an instrument for furthering the "trade or business" of the contributors for purposes of allowing deduction of the contributions to it, it should be so considered for purposes of determining the tax treatment of payments made out of it. There is no justification for an inconsistent treatment of the fund for the two purposes.

E. THE COMMISSIONER'S INTERPRETATION IS OF LONG STANDING AND SHOULD BE SUSTAINED

The position of the Commissioner that strike benefits are taxable income was first announced in 1920 (O.D. 552, 2 Cum. Bull. 73),³⁷ has been consistently adhered to ever since, and was recently expressly reaffirmed (Rev. Rul. 57-1, 1957-1 Cum. Bull. 15).³⁸ That interpretation, outstanding for 39 years through repeated reenactments of the relevant provisions of the income tax laws, is at the very least entitled to great weight. Cf. *Corn Products Co. v. Commissioner*, 350 U.S. 46; *United States v. Leslie Salt Co.*,

a strike fund are deductible (they serve a business purpose of the contributors) also require that distributions from the strike fund be taxable.

³⁷ At the same time, it may be noted, that the Commissioner first ruled that union dues were deductible business expenses. O.D. 450, 2 Cum. Bull. 105 (1920).

³⁸ The Commissioner has similarly held taxable unemployment benefits paid by a union (I.T. 1293, 1-1 Cum. Bull. 63 (1922)) or by an employer pursuant to a collective bargaining agreement (Rev. Rul. 56-249, 1956-1 Cum. Bull. 488) and old age pensions paid by a union to its members (Rev. Rul. 54-190, 1954-1 Cum. Bull. 46).

350 U.S. 383, 389; *Commissioner v. Jacobson*, 336 U.S. 28.

III. WHETHER THE STRIKE BENEFITS RECEIVED BY RESPONDENT WERE TAXABLE TURNS SOLELY ON A QUESTION OF LAW THAT MAY BE DECIDED BY THIS COURT

It has been the consistent view of this Court that on undisputed evidentiary facts the question whether a payment is a gift is a question of law, or at least a mixed question of law and fact, to be decided by the court. *Bogardus v. Commissioner*, 302 U.S. 34, 38-39; *Commissioner v. Jacobson*, 336 U.S. 28, 48-49; *Robertson v. United States*, 343 U.S. 711; *Helvering v. American Dental Co.*, 318 U.S. 322; cf. *Commissioner v. LoBue*, 351 U.S. 243. That view has equally been followed by most of the lower courts.³⁹ Since all the evidentiary facts in this case—the fact and terms of the payment, the relationship of the parties, the provisions of the constitution, etc.—were either stipulated or undisputed (see R. 57, 51), it follows that there was no question to be resolved by the jury.

Nevertheless, the court of appeals seems to have held—perhaps only alternatively, for it seems to have proceeded also to decide the question itself as a matter

³⁹ E.g., *Bounds v. United States*, 262 F. 2d 876 (C.A. 4); *Simpson v. United States*, 261 F. 2d 497 (C.A. 7); *Fahs v. Taylor*, 239 F. 2d 224 (C.A. 5), certiorari denied, 353 U.S. 936; *Northrup v. United States*, 240 F. 2d 304 (C.A. 2); *Willkie v. Commissioner*, 127 F. 2d 953 (C.A. 6), certiorari denied, 317 U.S. 659. But see *Peters v. Smith*, 221 F. 2d 721 (C.A. 3); *Neville v. Brookrick*, 235 F. 2d 263, 266 (C.A. 10); *United States v. Bankston*, 254 F. 2d 641, 642 (C.A. 6). Even when the courts speak in terms of a “clearly erroneous” standard, they seem in fact to be applying their own notions of what constitutes a gift. Compare *Peters v. Smith*, *supra*, with *Mutch v. Commissioner*, 209 F. 2d 390 (C.A. 3), decided by the same court.

of law (R. 62)—that the question whether strike benefits are gifts “is primarily a question of fact” on which the jury’s verdict was supported by “substantial evidence” (R. 61). The statement that whether a payment is a gift is a question of fact is, by itself, essentially meaningless, for there must first be a rule of law determining upon what facts the legal consequences turn. The rule of law that the court of appeals apparently meant to imply was that whether a payment is a gift turns on whether the payor “intended” the payment “as” a gift or “as” compensation.⁴⁰ We submit, however, that that is equally not a question of fact and necessarily involves a legal characterization. In our view, “intent” is meaningful in this context only as referring to the reasons why the payor was induced to make the payment, and in this case there was, we believe, no issue of fact as to those reasons.

1. Since “gifts” and “compensation” are themselves but legal characterizations, a statement by the payor that “I intend the payment to be a gift” can ultimately have no meaning other than “It is my desire that the payment not be taxable.” At most it implies the conclusion of the payor that the facts justify that characterization, but whether they do or not is a question that must be resolved by a rule of law saying upon what facts that characterization should turn. In short, given the same reasons for making the payment, the payor cannot by a mere act of will—

⁴⁰ Whether the union had an “obligation” to make the payments, the other issue on which reliance was placed on the jury’s verdict (R. 61), was, we submit, clearly a question of law.

"intending" the payment "as" a gift or "as" compensation—change the legal nature of the payment.

Nor is the problem remedied by substituting other words which equally subsume an implicit legal characterization—*e.g.*, whether the payor intended to "pay for" services (R. 61). Again, whether the causal relationship between the performance of the services and the payment is such to permit a characterization of the latter as being "for" the former is essentially a question of law, and the only question of fact is what that causal relationship was—*i.e.*, why the payor was induced to make the payment.

Words like "purpose" or "intent" are, of course, meaningful in describing what prospective effects the payor hopes to achieve by making the payment, and it is in that sense that we have referred to the "purpose" of the union in paying strike benefits as being to support the strike and further union objectives. That, however, is but a convenient way of stating the payor's reasons for making the payment and that usage must be kept distinct from such characterizations as a purpose or intent "to compensate" or "to make a gift."

2. As we have suggested throughout this brief, the payor's reason for making the payment is the "fact" upon which the characterization as a gift must ultimately turn: it is a gift only if the reason for the payment is one which the law defines as a "gift" reason, such as affection, sympathy, disinterested generosity, and the like. That does not mean, however, that there is always a question of fact whether such a reason exists, for frequently its existence is

necessarily precluded by the objective facts of the payment."

Strike benefits, we submit, involve such a case. The only "gift reason" that has been, or we think can be, suggested for their payment is that they are prompted by charity. As we have seen, however, that reason is inconsistent with, and cannot explain, the distribution of the benefits only to those persons in need who happen also to be complying with the union's request to support the strike in furtherance of union objectives, a limitation basically antithetic to the legal concept of charity. From that fact alone, therefore, it can be said as a matter of law that strike benefits are not prompted by charity and are instead causally related to the furtherance of the strike. It is only when the "gift" and "non-gift" reasons are both consistent with the objective facts that it is necessary further to examine the payor's state of mind to determine which reason was in "fact" operative.

In this case, moreover, even if it were necessary to reach the payor's subjective intent, the question would still be one to be resolved by the court. As we have seen (pp. 15-16, *supra*), the only intent that could be relevant here is the institutional purpose to be inferred from the strike fund provisions of the constitution, for the union agents executing the program

"For example, if an employer gives a Christmas bonus, reasonable in amount, to his employees, the fact that the class of recipients is defined by the employment relationship should preclude, as a matter of law, a claim that the payments were prompted solely by an impulse of Christmas generosity.

were doing no more than carrying out those provisions. That determination, in turn, is essentially one of construction of the written document and thus presents a question traditionally treated as one of law to be resolved by the court.

3. Finally, not only is the question here analytically one of law, but it is essential as a practical matter that it be so treated. Literally thousands of persons each year receive strike benefits under objective circumstances not materially different from those here, and not only would it be impossible to take each case to a jury, but basic fairness requires that all such persons be treated alike.

However the question is treated in litigation, moreover, it is obviously necessary for the Commissioner to adopt a uniform rule for administrative purposes. Unless a rule of law is announced by the courts, the Commissioner will have only two choices: (1) he can continue to assert taxability in all cases, with the result that strike benefits would in fact be taxed to all but the handful of taxpayers who chose to litigate the question and obtained a favorable jury verdict; or (2), if the jury verdicts are relatively consistent in finding the "fact" of a gift, he might in the interests of equal treatment abandon any attempt to tax strike benefits, thus giving to the jury verdicts the effect of a rule of law. Either way, a universal rule would in practice be established, and thus the real question here is not whether there is going to be such a rule but how it is to be established: by the default of taxpayers to litigate, by the juries, or by the courts. In our view, it is to the interests of the Government and the taxpayers

alike that the rule, whatever it may be, be announced as one of law by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

CARTER BLEDSOE,
Attorney.

OCTOBER 1959.

MOTION FILED FEB 20 1960

No. 55 and No. 376

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Petitioner*

v.

ALLEN KAISER

and

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN

No. 55

No. 376

On Writs of Certiorari to the United States Courts of Appeals
for the Seventh and the Sixth Circuits

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE
ON BEHALF OF MRS. BERNICE CURRY MYERS

TOGETHER WITH
BRIEF AMICUS CURIAE
ON BEHALF OF MRS. BERNICE CURRY MYERS

BENNETT BOSKEY
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Curry Myers*

February 20, 1960

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Petitioner*

v.

ALLEN KAISER

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No. 55

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On Writs of Certiorari to the United States Courts of Appeals
for the Seventh and the Sixth Circuits

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE
ON BEHALF OF MRS. BERNICE CURRY MYERS**

1. Motion is hereby made for leave to file in Nos. 55 and 376 a Brief Amicus Curiae on behalf of Mrs. Bernice Curry Myers. The proposed Brief Amicus Curiae is annexed.

2. Written consents from the taxpayers' attorneys in both No. 55 and No. 376 have been lodged with the

Clerk. The Solicitor General has advised he does not assent, adding that if a motion for leave to file is submitted, then the Government will not file objection; but he requested that his letter be included in the Motion so the Court might know his reasons for withholding consent.* Those reasons should not prevail in the present circumstances.

3. Nos. 55 and 376 (together with *Stanton v. Commissioner*, No. 546) all raise fundamental questions as to the distinctions between gift and income under the federal tax laws.

4. Over the past decade there has been a considerable amount of litigation involving questions whether voluntary payments made by employers to widows of deceased employees were to be considered as gift or income. The great bulk of these cases have been decided in favor of the taxpayer, the courts holding the particular payments to be gift, not income. In deciding for the taxpayer in case after case, the courts have relied upon general considerations concerning what is "gift" and what is "income"; upon criteria expressed in prior judicial determinations, such as *Bogardus v. Commissioner*, 302 U.S. 34; and upon ordinary common sense and common understanding. A solid consensus has been reached; by now, more than thirty judicial determinations hold that voluntary payments made by employers to widows constituted gift and not taxable income.** In fact, the consensus of judicial determinations finally became so strong, and the successive de-

* Accordingly, the Solicitor General's letter is attached as an exhibit to this Motion.

** Such judicial determinations are listed in the Appendix to the proposed Brief Amicus Curiae.

feats for the Government in this type of litigation so numerous, that in mid-1958, the Internal Revenue Service issued an official announcement (Technical Information Release No. 87, dated August 25, 1958) that it would no longer contest this type of case arising under the 1939 Internal Revenue Code "unless there is clear evidence that they [the voluntary payments to the widow] were intended as compensation for services, or where the payments may be considered as dividends"; it reserved its position with respect to cases arising under the 1954 Internal Revenue Code.

5. None of the three cases now before this Court for argument on the merits (Nos. 55, 376 and 546) involves, on its facts, an employer's voluntary payment to the widow of a deceased employee. But the Government's discussion of the law has included references to that line of decisions (see Government's Brief in No. 55, at pages 26-27 and 37; Government's Petition for Certiorari in No. 376, at pages 6-7 and 11; Government's Brief in No. 376, pages 11-12); and the various criteria which the Government is suggesting might, if accepted without qualification and modification, have an important impact on cases of that type. If fundamental questions relating to the distinctions between gift and income are to be canvassed, opportunity should be afforded to a taxpayer directly interested to bring to the Court's attention the extensive history which has been developed with respect to voluntary payments to widows of deceased employees. Any general criteria being proposed by the Government for differentiating between gift and income should be considered and tested in the light of this important category of cases. For this purpose, it is submitted, a taxpayer so situated should be heard from.

6. Mrs. Myers is a taxpayer so situated, with a direct interest in this matter. In 1956, shortly after her husband's death, Mrs. Myers received a sum of money from her husband's employer, a non-profit organization, the Committee for Economic Development (CED); this sum was a wholly voluntary payment by CED to her as an expression of sympathy and gratitude, and was contemporaneously described by the Secretary of the CED as a gift to Mrs. Myers. In connection with her tax return for 1956, which is still pending before Internal Revenue Service, her position is that this sum was clearly a gift from CED to her, and not income. In connection with the cases now before this Court, her position is that any formulation of criteria for distinguishing between gift and income should give appropriate recognition to, and should leave undisturbed, the long and settled line of judicial decisions which have held that voluntary payments by employers to widows of deceased employees are, under reasonably comparable circumstances, to be treated as gifts and not income to the widow.

7. The fact that her case is still before Internal Revenue Service, rather than in some appellate court, should not be deemed an obstacle to the filing of the proposed Brief Amicus Curiae. Mrs. Myers' tax return is a pending matter with the Government; her interest in the outcome is equally direct, no matter at what level it is pending. The proper safeguarding of her interests, as well as due regard for the interests of other taxpayers with comparable matters pending, underscores the importance of placing the pertinent materials before the Court in connection with any consideration now to be given to formulating, or perhaps reformulating, fundamental criteria for distinctions be-

tween gift and income. The proposed Brief Amicus Curiae will help to assure that a full picture on these matters is available to the Court; and it seems unlikely that this will otherwise be done.

Respectfully submitted,

BENNETT BOSKEY
1701 K Street, N. W.
Washington 6, D. C.
*Attorney for Mrs. Bernice
Curry Myers*

February 20, 1960

EXHIBIT TO MOTION

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

February 4, 1960

5-85-993

5-9954

5-52-6407

Bennett Boskey, Esq.
Volpe, Boskey and Skallerup
1701 K Street, N. W.
Washington 6, D. C.

Re: United States v. Kaiser, No. 55
Commissioner of Internal Revenue
v. Duberstein, No. 376
Stanton v. Commissioner, No. 546
Oct. Term, 1959

Dear Mr. Boskey:

I have your letter of January 28 in which you request consent to the filing of a brief *amicus curiae* in these cases on behalf of Mrs. Bernice Curry Myers.

This Office has carefully considered your request, and I regret that we cannot assent to it. As you are aware, this Office follows a liberal policy, consistent with its obligations to the Supreme Court, in passing on requests for consent to the filing of *amicus curiae* briefs. Such consent is generally given when the applicant has a substantial interest in the outcome of a case, and the proposed brief could assist the Court by presenting relevant arguments or materials which might not otherwise be submitted. In no instance does consent depend on whether the applicant's position is in accord with that of the Government as a litigant in the particular case before the Court.

As your letter correctly observes, the above cases now pending before the Court raise fundamental questions as

to the distinction between gift and income under the federal tax laws. Like most tax cases in which the Court grants certiorari, they are being reviewed because of the substantial importance of the questions involved and the need for having them authoritatively determined. The decisions which the Court renders in tax cases usually have binding consequences for thousands if not millions of taxpayers. For that reason the Government does not consider that a taxpayer who might be affected by the Supreme Court's decision in a pending case has a sufficient interest to justify his appearing as *amicus curiae* in that case. If that were deemed a sufficient interest, the result might be to deluge the Court with a mass of *amicus* briefs.

As you know, the Government generally consents to the filing of an *amicus* brief on behalf of a trade (or comparable) organization representing a large number of similarly situated taxpayers, or on behalf of a particular taxpayer having an identical claim in another case awaiting adjudication by a lower appellate court, where he seeks to submit relevant arguments or materials not adequately presented by the parties. Your client's interest in the pending cases, however, appears to be more tenuous. The facts to which you refer in your letter appear to fall within the general category of so-called "widow's bonus" cases. None of the three cases before the Supreme Court involves such a factual situation. However, I would not withhold consent for that reason alone.

According to your letter, your client has submitted a tax return, together with a supporting memorandum of counsel, claiming that a certain sum of money received from her late husband's employer was a gift and not income. As your letter points out, this claim has not been finally acted upon, one way or the other, by the Internal Revenue Service, nor have the full facts and circumstances been developed. At this stage one cannot tell whether the Service will or will not uphold your client's claim, or whether there

are circumstances relevant to the transaction other than those stated in your letter. If the facts were that your client's claim had been rejected by the Internal Revenue Service, that litigation had ensued, and that it had progressed to the point where any issues of fact had been distilled out of the case and only issues of law remained which would be governed by the Supreme Court's decision in the pending cases, your request would then possess a solidity which we feel it now lacks.

For all that now appears, your client's claim may eventually be sustained administratively. Or it may be that the controlling facts of her case will turn out, at least in the Government's view, to be quite different from those you now assert. Moreover, the very filing of an *amicus* brief in the Supreme Court on behalf of your client, while her case is still in the earliest administrative stages, would inevitably give rise to implications or impressions concerning the Government's position on her case or class of case which might turn out to be wholly unfounded; and this could be true even though it were explicitly stated that no final administrative determination had yet been reached.

In short, we believe that your client's claim is not at the present time a matter for consideration by the Supreme Court together with the three pending cases. We do not think that either the Government or the taxpayers in these cases should have to deal with a fourth set of "facts" not actually before the Court. If the general "widow's bonus" class of cases presents considerations which are relevant to the issues of law involved in the cases before the Court, the parties on both sides can deal with them. In this connection, I understand that you are unwilling to omit discussion of the particular facts of your client's claim, as you see them, or to confine your brief to a general discussion of the "widow's bonus" class of cases as they affect the pending cases. As I have already indicated, the situation would be different if the request here were made on behalf of a

taxpayer involved in a "widow's bonus" case now pending in a court of appeals where it would be clear what the full facts are and what the Government's position is in relation to those facts.

If you should decide to submit a motion for leave to file your proposed *amicus curiae* brief, the Government will not file an objection. However, in such event, in order that the Court may know my reasons for withholding consent, I request that you include a copy of this letter in your motion.

Sincerely yours,

S. J. LEE RANKIN

J. Lee Rankin

Solicitor General

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, *Petitioner*

vs.
ALLEN KAUFER

and

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ALICE DEBERSTEIN and SYLVIA DEBERSTEIN

On Writs of Certiorari to the United States Courts of Appeals
for the Seventh and the Sixth Circuits

BRIEF AMICUS CURIAE
ON BEHALF OF MRS. BERNICE CURRY MYERS

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February 20, 1960

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IN THE
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MOSE DUBERSTEIN and SYLVIA DUBERSTEIN

No. 376

On Writs of Certiorari to the United States Courts of Appeals
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BRIEF AMICUS CURIAE
ON BEHALF OF MRS. BERNICE CURRY MYERS

QUESTIONS PRESENTED

The ultimate question presented in each of the two cases is whether a certain type of item (strike benefits in No. 55; a Cadillac automobile in No. 376) received by the taxpayer is to be included in or excluded from gross income. This in turn depends largely upon dis-

Another such question is presented in No. 546, *Stanton v. Commissioner of Internal Revenue*, which the Court has set down for argument to follow these two cases.

inctions between "gift" and "income", and in this connection the Government is urging various criteria upon the Court. Important questions are accordingly presented as to the applicable criteria.

INTEREST OF AMICUS CURIAE

Mrs. Myers has a direct interest in the proper formulation of the criteria for distinguishing between gift and income under the federal tax laws. Her 1956 income tax return, which involves exactly such a question, has now been pending unresolved before Internal Revenue Service for about three years; no final position has yet been taken by Internal Revenue Service with respect to her case.

The facts of her case are simple and clear-cut. Mrs. Myers' husband, Dr. Howard B. Myers, had been continuously employed since 1943 by the Committee for Economic Development (CED) in highly responsible positions, first as Associate Director of Research and then as Director of Research. The CED is a non-profit, educational, economic research organization, established in 1942, with offices in New York City and Washington, D. C.; and it is a tax-exempt organization under the federal income tax laws. Dr. Myers' annual salary, from 1951 on, was \$25,000 per year or higher. On February 20, 1956, at a time when Dr. Myers was suffering from an illness which made his death imminent, the Executive Committee of CED's Board of Trustees, being advised of Dr. Myers' serious illness, considered a recommendation that in the event of his death a voluntary payment be made to his family as an expression of sympathy and gratitude. A Resolution was thereupon adopted, authorizing that in the event of Dr. Myers' death the CED should pay "to his wife, if liv-

ing, and otherwise to his children, as an expression of the Committee's sympathy and gratitude, an amount equal to the salary that would have been paid for the balance of the current year had death not occurred". Shortly thereafter, on March 9, 1956, Dr. Myers died at age 55. On March 28, 1956, the Secretary of the CED sent to Mrs. Myers' then attorney a copy of the Resolution, stating in his letter that this was the Resolution, "relative to the gift to" Mrs. Myers, and said the CED's New York office would that day send Mrs. Myers the full amount. By separate letter also dated March 28, 1956, the CED sent Mrs. Myers a check in the amount of \$21,643.12, payable to her with a letter stating:

"Enclosed please find the check of the Committee for Economic Development in the amount of \$21,643.12. This is being sent to you in accordance with a resolution adopted by the Executive Committee of CED and instructions given by Mr. Frazar Wilde, Chairman of the Research and Policy Committee, and is intended as an expression of sympathy in the loss of your husband and of gratitude for the outstanding work he performed as Director of Research for the Committee.

"The amount of the check equals the salary that would have been paid to Howard from March 9 to the end of the current year.

"Our warm regards and best wishes accompany this voluntary payment."

Mrs. Myers duly filed with Internal Revenue Service a Donee's Information Return (Form 710) reporting this gift from CED. On her 1956 income tax return she stated as a matter of information that CED had made this wholly voluntary payment to her; that she had been advised that, in the opinion of counsel, this

was a gift from CED to her, and not income; and that she had accordingly filed a Donee's Information Return with respect to it. In March 1958 a Memorandum in support of this position was submitted to Internal Revenue Service, which still has the matter under consideration.

In connection with the cases now pending before this Court, the position of the Amicus Curiae is that any formulation of criteria for distinguishing between gift and income should give appropriate recognition to, and should leave undisturbed, the long and settled line of judicial decisions which have held that voluntary payments by employers to widows of deceased employees are, under reasonably comparable circumstances, to be treated as gifts and not income to the widow.

ARGUMENT

Even if the matter were wholly one of first impression, it would be clear that in a case such as that of Mrs. Myers, the sum turned over to the widow by her deceased husband's employer is a gift to her and hence wholly excludable from gross income. Proposed criteria for distinguishing between gift and income are inadequate or incorrect if they might becloud the result in a case like this.

Moreover, the matter is by no means one of first impression. It has a long history in hard-fought litigation, hard-fought because for an extensive period the Internal Revenue Service maintained a totally intransigent attitude in the face of successive court defeats. Comparable situations have been considered on numerous occasions by the Tax Court and by various federal courts. Many decisions have been rendered on the subject. There are over thirty of them (see Appendix

to this Brief) which constitute an overwhelming body of precedent in support of the taxpayer's position in such cases.

Indeed, for over ten years matters of this nature have been coming before the Tax Court, and have been uniformly decided in favor of the taxpayer where the payment to the widow is shown to be voluntary and not compensation for the services which the deceased employee had rendered.

The line of decisions in the Tax Court begins with *Louise K. Aprill*, 13 T.C. 707 (1949), where a corporation had voluntarily given \$4,000 to the widow of its deceased president, "in recognition of the services" which had been rendered by the deceased president. Judge Oppen examined the facts in the light of the simple common sense of the situation, as well as with due regard to what this Court had said in *Bogardus v. Commissioner*, 302 U.S. 34, 44 (1937), to the effect that "A gift is nonetheless a gift because inspired by gratitude for the past faithful service of the recipient." Judge Oppen concluded that the amounts paid to the widow were of a gratuitous character and hence excludable from the widow's gross income.² Similar decisions were rendered in *Alice M. Macfarlane*, 19 T.C. 9 (1952)³ and then in *Estate of Arthur W. Hellstrom*, 24 T.C. 916 (1955), where Judge Rice's opinion concludes by stating (24 T.C. at 920):

² The Commissioner published his express acquiescence to *Aprill* in 1950, see 1950-2 C.B. page 1, although in November 1957 (which was long after the CED made its gift to Mrs. Myers) he withdrew such acquiescence and substituted nonacquiescence therefor, see 1957-2 C.B. page 8.

³ The Commissioner published his partial acquiescence to *Macfarlane* in 1953, see 1953-1 C.B. page 5.

7. "We think the controlling facts here which establish the payment in question as a gift are that the payment was made to petitioner and not to her husband's estate; that there was no obligation on the part of the corporation to pay any additional compensation to petitioner's husband; it derived no benefit from the payment; petitioner performed no services for the corporation and, as heretofore noted, those of her husband had been fully compensated for. We think the principal motive of the corporation in making the payment was its desire to do an act of kindness for petitioner. The payment, therefore, was a gift to her and not taxable income."

And there had been at least three additional Tax Court decisions to the same effect (see list in Appendix to this Brief) by the time—early in 1956—when the CED decided to make this voluntary payment to Mrs. Myers. Subsequent decisions of the Tax Court provided the strongest further confirmation of the doctrine (again; see list in Appendix to this Brief). The unanimity of view found in these numerous decisions of the Judges of the Tax Court has been paralleled by similar unequivocal decisions in the federal courts throughout the country; these include not only a large number of district courts, but also the Courts of Appeals for the Sixth and Fourth Circuits (the federal court decisions are likewise included in the list in the Appendix to this Brief).

This overwhelming body of precedent, both in the Tax Court and in the federal courts throughout the country, establishes that the law on this subject has become settled and has remained settled, despite the vigorous efforts which the Internal Revenue Service made to overturn it. Indeed, the isolated cases in

which the Government has prevailed in this general area are so different on their facts from the usual run of cases (and so different from the specific case of Mrs. Myers) that they strengthen, rather than impair, the position of the taxpayer in a case such as Mrs. Myers'.

The Government's successive defeats in this type of litigation finally led the Internal Revenue Service in August 1958 to cease contesting the point in cases arising under the 1939 Internal Revenue Code, so that it became unnecessary for taxpayers so situated to be forced to obtain judicial determinations to vindicate their position. The abandonment of its position was announced by the Internal Revenue Service in Technical Information Release No. 87, dated August 25, 1958, which reads as follows (1958 CCH Standard Federal Tax Reports ¶6662):

"In view of a number of adverse court decisions in cases involving voluntary payments to widows by their deceased husbands' employers, the Internal Revenue Service today announced that it will no longer litigate, under the Internal Revenue Code of 1939, cases involving the taxability of such

⁴ Thus, in *Fisher v. United States*, 129 F. Supp. 759 (D. Mass. 1955), the resolution of the Association had specified that the widow be paid "the balance of the retirement compensation", which was a definite sum the Association had actually voted to pay to its employee and had started to pay to him before his death; this vital distinction on the facts was emphasized by the Tax Court in its opinion in *Elizabeth R. Matthews*, 15 TCM 204, 206 (1956). Similarly, in *Simpson v. United States*, 261 F.2d 497, (7th Cir. 1958), certiorari denied, 359 U.S. 944 (1959), the Court found that the payment to the widow was made pursuant to a long-established plan, evidenced by a pre-existing corporate resolution and consistently followed by the corporation, which had been established for the purpose of encouraging living executives to continue in their employment by the corporation, and that the corporation did not intend to make a gift to the widow.

payments unless there is clear evidence that they were intended as compensation for services, or where the payments may be considered as dividends. Payments which will be considered 'voluntary' in applying this policy do not include payments made pursuant to a contract or otherwise binding obligation or pursuant to a plan or statute in effect before the husband's death.

"In line with this new litigation policy, field offices of the Service will similarly dispose of 1939 Code cases not yet in litigation.

"The Service emphasized that this announcement represents a litigation policy, implemented by consistent administrative action, pertaining to 1939 Code cases only. The position of the Service with respect to cases in this area arising under the Internal Revenue Code of 1954 involves other considerations and will be made the subject of a future announcement."

It will be noted that in this Release, the Internal Revenue Service reserved its position with respect to cases arising under the 1954 Internal Revenue Code. Presumably this is because the Internal Revenue Service wished to be free to contend that, in some way or other, the result was to be affected by the addition, in the 1954 Code, of Section 101(b), 26 U.S.C. § 101(b), which provides a \$5,000 exclusion from gross income for "amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee". This new subsection brought into the Code a \$5,000 exclusion for death benefits which otherwise would have been income (such as the payments made in the *Fisher* and *Simpson* cases, referred to in note 4 above). In no way, however, did it transmute into in-

come the type of voluntary payments, such as made in Mrs. Myers' case and the many other cases which have been referred to, which were otherwise clearly recognized as gifts. There is not a syllable in the legislative history of the 1954 Code which would warrant imputing to Congress an intention to make any such change. See Jennings, *Voluntary Payments to Widows of Employees*, (1959) 37 Taxes 530, 537-538 and 559. In this respect the settled and established law as to gifts remained wholly unchanged by the 1954 Code.⁵ The applicable provision of Section 102(a) of the 1954 Code, excluding gifts from gross income, is substantially identical to the comparable provision in Section 22(b)(3) of the 1939 Code, and taxpayers certainly should have been entitled to rely on this settled interpretation of the tax laws.

If the Government is dissatisfied with the solid doctrine which has been so plainly adjudicated by the courts in this area, then the Treasury Department is always able to appeal to the Congress to make a change in the law. It has not done so; and there is no reason to suppose that the Congress would be receptive to any such proposal. But whether such a change should or should not be made for future years is certainly something to be determined a matter of legislative policy.

From the references to this line of cases which appear in the papers filed by the Government in Nos. 55 and 376,⁶ it is not entirely clear whether the Govern-

⁵ The only litigated decision under the 1954 Code thus far reported so holds. *Reed v. United States*, 59-1 USTC ¶ 9264 (W.D. Ky.). There is an ill-considered dictum to the contrary in *Rodner v. United States*, 149 F. Supp. 233, 237 (S.D. N.Y. 1957).

⁶ Government's Brief in No. 55, pages 26-27, 37; Government's Petition for Certiorari in No. 376, pages 6-7, 11; Government's Brief in No. 376, pages 11-12.

ment is now intending or hoping to make some inroads on this settled line of judicial decisions. But the criteria which the Government is suggesting for distinguishing between gift and income seem inadequate, and may have some tendency to becloud what at least in this area has been settled and clear.

First, the Government's approach—exemplified particularly by its Brief in No. 55 (pages 26-34 thereof)—is to propose various restrictive rules which the Government suggests should each by itself be deemed sufficient to prevent a given transaction from being a gift. This involves excessive fragmentation of the transaction. For example, despite the argument which the Government seems to be making at pages 26-30, a man clearly may make a gift to his grandson, and still have some collateral "business reason" for thinking this is a good idea; a corporation clearly may make a gift to an engineering school, and still have some "business reason" which it thinks will also be served by doing so; a coal mining company may make an *ad hoc* gift to the destitute families of employees who have been killed in a mine disaster, and still have some "business reason" for feeling it is prudent to do so. The concepts of "gift" and a relevant "business reason" are by no means mutually exclusive. The Government is suggesting a dichotomy which is artificial, arbitrary, and an inadequate basis for the proper administration of the tax laws in this area.

Second, the main thrust of the criteria proposed in the Government's Brief in No. 376 has to do with the Government's argument that it is "motive" rather than "intent" which should be controlling in determining whether a particular transaction results in gift or income. To the extent that this would be something

more than a semantic exercise, it too seems by itself a totally inadequate basis for the administration of the tax laws. "Motive" may be one of many pertinent factors, when it is apparent what the motive was. But motive will often be obscure, and the search for it will then turn tax cases into psychiatric inquiries for which, one may suggest, the Internal Revenue Service is not particularly well equipped. Moreover, it seems a somewhat far-fetched reading of the tax laws to say, for example in *Mrs. Myers*' case, that the clearly expressed intention of CED to express its sympathy and gratitude is totally irrelevant, but that instead the inquiry must be made exclusively into motive.⁷ And why indeed should it be totally irrelevant that the employer may have intended to, and ~~did~~ carry out the transaction in full compliance with then existing Tax Court decisions determining such voluntary payments to a widow to be a gift?

It may well be that in *Mrs. Myers*' case the conclusion of gift, not income, would flow just as surely from some "motive" test as from a consideration of the clearly expressed intention. But no justification ap-

⁷ Since the Government seems to have some preference (see Government's Brief in No. 376, pages 14-15) for the dissenting rather than the majority opinion in *Boyardus v. Commissioner*, 302 U.S. 34, it may be noted that the dissenting opinion there written by Mr. Justice Brandeis for four members of the Court states (302 U.S. at 45): "What controls is the intention with which payment, however voluntary, has been made." Moreover, the Government's recent brief in the Fourth Circuit, as quoted with approval in that Court's opinion in *Boards v. United States*, 262 F. 2d 876, 882 (1958), stated: "... whether the payments in question represented income or gifts to the taxpayer cannot be answered by mere definitions or categories. Rather, it presents a problem to be decided in the light of all the facts and circumstances showing the intention of the parties, particularly that of the corporation-payer."

pears for complicating and beclouding this area of the tax laws by adopting as the exclusive criterion the obscure and restrictive "motive" test which the Government is suggesting.

CONCLUSION

In distinguishing between gift and income it is important to avoid inflexible, restrictive criteria which will prevent the transaction from being viewed in its entirety, or will interfere with the application of common sense, or will operate to unsettle particular types of transactions (such as voluntary payments to widows) where the law has been well settled and has been relied upon. The criteria being proposed by the Government in Nos. 55 and 376 are inadequate for the proper administration of the tax laws, and should not be accepted by the Court without sufficient modification and qualification.

Respectfully submitted,

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February 20, 1960.

APPENDIX TO BRIEF AMICUS CURIAE.

List of Judicial Determinations Holding Voluntary Payments Made by Employers to Widows Constituted Gift and Not Taxable Income

A. TAX COURT DECISIONS

1. Decision by Judge Oppen in *Louise K. Aprill*, 13 T.C. 707 (1949)
2. Decision by Judge Harron in *Alice M. Macfarlane*, 19 T.C. 9 (1952)
3. Decision by Judge Tietjens in *Ruth Hahn*, 13 TCM 308 (1954)
4. Decision by Judge Rice in *Estate of Arthur W. Hellstrom*, 24 T.C. 916 (1955)
5. Decision by Judge Harron in *Estate of Ralph W. Rear-don*, 14 TCM 577 (1955)
6. Decision by Judge Tietjens in *Marie G. Haskell*, 14 TCM 788 (1955)
7. Decision by Judge Atkins in *Elizabeth R. Matthews*, 15 TCM 204 (1956)
8. Decision by Judge Van Fossan in *Ethel G. Mann*, 16 TCM 212 (1957)
9. Decision by Judge Harron in *Estate of John Hekman*, 16 TCM 304 (1957)
10. Decision by Judge Tietjens in *Estate of Frank J. Foote*, 28 T.C. 547 (1957)
11. Decision by Judge Arundell in *Estate of John A. May-cann, Sr.*, 29 T.C. 81 (1957)
12. Decision by Judge Forrester in *Florence S. Luntz*, 29 T.C. 647 (1958)
13. Decision by Judge Fisher in *Alice D. Ryder*, 17 TCM 207 (1958)

24. Decision by Judge Tietjens in *Estate of Albert W. Morse*, 17 TCM 261 (1958)

B. FEDERAL COURT DECISIONS

15. Decision by Judge Grooms in *Black v. Davis*, 55-1 USTC ¶9361 (N.D. Ala.)
16. Decision by Judge Hall in *Slater v. Riddell*, 56-2 USTC ¶9892 (S.D. Cal.)
17. Decision by Judge Atwell in *Graves v. United States*, 56-2 USTC ¶10,034 (N.D. Tex.)
18. Decision by Judge Steckler in *Baur v. United States*, 57-1 USTC ¶9210 (S.D. Ind.)
19. Decision by Judge Steckler in *Bledsoe v. United States*, 57-1 USTC ¶9211 (S.D. Ind.)
20. Decision by the Sixth Circuit (Judges McAllister, Stewart and Cecil) in *United States v. Bankston*, 254 F. 2d 641 (1958), affirming decision by Judge Boyd in *Bankston v. United States*, 57-1 USTC ¶9626 (W.D. Tenn.)
21. Decision by Judge McColloch in *Jackson v. Granquist*, 57-2 USTC ¶9713 (D. Ore.)
22. Decision by Judge Darr in *Nixon v. United States*, 57-2 USTC ¶9982 (E.D. Tenn.)
23. Decision by Judge Dimock in *Rodner v. United States*, 149 F. Supp. 233 (S.D. N.Y. 1957)
24. Decision by Judge Tehan in *Friedlander v. United States*, 58-1 USTC ¶9182 (E.D. Wis.)
25. Decision by Judge Nordbye in *Linoff v. United States*, 58-1 USTC ¶9204 (D. Minn.)
26. Decision by Judge Whitehurst in *Neuhoff v. United States*, 58-1 USTC ¶9506 (D. Fla.)
27. Decision by Judge Brooks in *Hardy v. United States*, 58-2 USTC ¶9521 (W.D. Ky.)

28. Decision by Judge Cecil in *Carley v. United States*, 163 F. Supp. 429 (S.D. Ohio, 1958)
29. Decision by Judge Boldt in *Jones v. Squire*, 58-2 USTC ¶9588 (W.D. Wash.)
30. Decision by Judge Hannay in *Bank of the Southwest National Association v. United States*, 165 F. Supp. 200 (S.D. Tex. 1957)
31. Decision by Judge Brooks in *Citizens Fidelity Bank & Trust Co. v. United States*, 164 F. Supp. 544 (W.D. Ky. 1958)
32. Decision by Judge Darr in *Campbell v. United States*, 58-2 USTC ¶9763 (E.D. Tenn.)
33. Decision by Judge Lederle in *Allinger v. United States*, 58-2 USTC ¶9949 (E.D. Mich.)
34. Decision by the Fourth Circuit (Judges Sobeloff, Soper and Haynsworth) in *Bounds v. United States*, 262 F. 2d 876 (1958).
35. Decision by Judge Shelbourne in *Reed v. United States*, 59-1 USTC ¶9264 (W.D. Ky.)
36. Decision by Judge Robinson in *Greenberg v. United States*, 59-2 USTC ¶9676 (D. Neb.)

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No. 55

JAMES R. BROWNING, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

UNITED STATES OF AMERICA,

Petitioner,

ALLEN KAISER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

No. 55,

UNITED STATES OF AMERICA,
Petitioner,
v.
ALLEN KAISER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Court of Appeals (R. 58-64) is reported at 262 F. 2d 367. The opinion of the District Court (R. 45-54) is reported at 158 F. Supp. 865.

Jurisdiction

The judgment of the Court of Appeals was entered on December 22, 1958 (R. 64-65). The petition for a writ of certiorari was filed on April 21, 1959, and granted on June 1, 1959 (359 U.S. 1010). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Question Presented

Whether relief benefits in the form of food and rent given by a labor union to needy strikers are subject to federal income tax where the recipients, who need not be members of the union, render no services to the union nor promise anything in return for the strike relief.

Statute Involved

Internal Revenue Code of 1954.

Sec. 61. *Gross Income Defined.*

(a) General Definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions; and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;
- (8) Alimony and separate maintenance payments;
- (9) Annuities;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership gross income;
- (14) Income in respect of a decedent; and
- (15) Income from an interest in an estate or trust.

Sec. 102. *Gifts and Inheritances.*

(a) General Rule:—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

Statement

Respondent Allen Kaiser went to work for the Kohler Company of Sheboygan, Wisconsin in 1952 (R. 24). In 1953, the Kohler Company signed a contract with the United Automobile Workers and its Local 833 (R. 14) under which Local 833 had the bargaining rights at the Kohler Company plant (R. 26). When the contract expired on March 1, 1954 (R. 16) and the Company and Local 833 were unable to agree on a new contract, a special membership meeting was called for the purpose of taking a strike vote (R. 26). At this special meeting, held on March 4, 1954 (R. 16), an overwhelming majority of those present voted by secret ballot in favor of the strike (R. 26). Nevertheless, while the members of the Local were very desirous of striking at that time, representatives of the International Union persuaded them to continue working and to try to iron out their differences with the Kohler Company around the bargaining table (R. 29, 38). Finally, however, on April 5, 1954, after working a month and five days without a contract, the members of the Local "decided they weren't getting anywhere; they had to take some other action, and took strike action" (R. 38).¹

¹ The International Union, although it had restrained the strike as long as it could, finally approved the strike (R. 46) pursuant to the provisions of the International Constitution (R. 17). The Government's brief (p. 14), treating "the International as the only 'union' involved" because the bulk of the strike relief came from the International, repeatedly states that respondent's striking was "at the request of the union itself" (p. 8), "at the request of the union" (p. 9), "at the request of the union itself" (p. 22). But the fact is that the strike was most assuredly not called at the request of the International and was not for its benefit; the strike was called by a secret ballot of the members of the Local for their own benefit.

Respondent Kaiser was not a member of the UAW Local, but he went out on strike with the others. Since he had no other job at the time and no income from any source (R. 24), he was in need of assistance for food and rent and he went down to the union headquarters to apply for strike relief (R. 24). In accordance with union policy (R. 21-23), the counsellors at union headquarters questioned him as to whether he had any independent source of income (R. 25). On finding that respondent was actually in need, he was given a weekly food voucher for \$7.50 which he could use at "some store in Sheboygan" (R. 25) and the union began paying his rent of \$9.00 a week (R. 25) in order to forestall his eviction (R. 26). He received no cash whatever (R. 25). The amount of relief depended upon the applicant's marital status, number of children, bank account, other resources or income, number of employed persons in the family and availability of relief from community agencies (R. 22, 23, 25, 26, 29, 30, 47). Respondent's strike relief, valued at \$16.50 a week, was predicated on his having no bank account, no income, no job, no dependents, and no community assistance (R. 24, 25). The \$16.50 strike relief bore no relation to his prior earnings at the Kohler Company which were in the neighborhood of \$100.00 a week (R. 4, 14, 61).

As the court below stated, *when respondent "received his assistance, he neither gave nor promised anything in return"* (R. 59). Respondent was not required to serve on picket lines, help in the soup kitchen or render any service whatever in order to receive strike relief (R. 26, 27, 30, 31, 48, 59). Indeed, the union counsellors who found him in need and approved his food vouchers and rent payments had no way of knowing whether respondent or any other employee on strike performed any strike services (R. 30, 31). Although no one asked respondent to become a member of the union, he did so on August 19, 1954, three

and one-half months after commencement of his relief benefits (R. 24); because he was on strike, he was not required to and did not pay any initiation fees or dues (R. 24).

The strike relief received by respondent came largely from the International Union's strike fund (R. 20), which had been accumulated by allocating to that fund 25 cents of the monthly per capita dues of \$1.25 paid into the International Union for each member of each Local Union (R. 18). In addition, UAW locals and those of other unions, fraternal organizations, businessmen and others who were friendly to the cause of the Kohler strikers, also made contributions for strike relief (R. 29, 31, 59). Less than one percent of the strike relief came from the Local's own funds (R. 20).

Respondent started receiving strike relief on May 4, 1954 and received it throughout the remainder of 1954, the tax year in question. The total value of respondent's 1954 relief in food vouchers and rent payments amounted to \$565.54 (\$16.50 per week for 8 months). The respondent did not include this \$565.54 in his 1954 return. The Commissioner of Internal Revenue determined that this amount was includible and imposed an additional tax of \$108.00 (R. 4, 13, 19, 59). Respondent paid this additional tax and sued for refund in the United States District Court for the Eastern District of Wisconsin (R. 1-3).

After the evidence on the foregoing points was presented, the District Court submitted to the jury the question: "*Were the payments made to plaintiff . . . a gift?*" (R. 45). The Court charged the jury that to constitute a gift the "payments" must have been "intended to be gratuitous, without either legal or moral obligation to make the payments and without expecting anything in return" (R. 42). The jury, in a special verdict, found the strike relief received by respondent to have been a gift and judgment was accordingly entered for respondent (R. 45). Three

months later, however, upon motion of the Government, the Court set aside the verdict and entered judgment for the Government (R. 55-56), holding that "as a matter of law the strike benefits constituted taxable income and not a gift" (R. 50). The Court of Appeals reversed and held (Judge Knoch dissenting) that: (1) "*The strike benefits received by plaintiff under the facts of this case are not taxable income*" and (2) "*in any event, the strike benefits received by plaintiff were gifts which are expressly excepted from taxable income by § 102, Internal Revenue Code of 1954*" (R. 60-61).

Summary of Argument

I

This Court should affirm the decision below upon the basis of the jury verdict or upon the doctrine of equal tax treatment, either of which grounds avoids the necessity of resolving fundamental statutory questions regarding "income" and "gift." The Government would require this Court to solve broad definitional questions concerning the nature of taxable "income" and tax exempt "gifts." But the issue of strike relief is too special and atypical a vehicle to provide the occasion for redefining such general concepts. Two more limited grounds of decision are here available—first, the jury finding upon instructions unassailed by the Government that respondent's relief benefits constituted a gift, and second, the doctrine of equal tax treatment applied in the light of the Government's inability to distinguish strike relief from the most analogous categories of nontaxable social security and public and private relief benefits.

A. The jury's verdict of gift upon instructions unassailed by the Government is dispositive of this case. The District Judge gave instructions to the jury on the issue of gift which were, if anything, unduly favorable to the Govern-

ment. In any event, the Government takes pains to demonstrate here the correctness of the criteria for gifts which were the basis of the instructions to the jury and upon which that jury found against the Government. While the Government asks this Court for a strike relief determination permitting the Commissioner "to adopt a uniform rule for administrative purposes", this Court cannot establish a principle predicated on factual assumptions directly contrary to those found by a jury upon instructions more than favorable to the Government.

B. An alternative narrow ground for affirmance is provided by the doctrine of equal treatment, since the most analogous social security and public and private relief benefits are not subject to tax. In this case the Commissioner has, for no apparent reason, departed from the principle of equal treatment of those similarly situated.

(i) The Commissioner has long held that social security benefits are nontaxable. We submit that if old age, unemployment and similar benefits under the social security system paid as a matter of right and based upon an employee's previous earnings are not taxable, then strike benefits furnished only upon the basis of need and completely unrelated to the individual's earnings are even less properly subject to the tax. Indeed, the Commissioner's obvious departure from the principle of equal treatment is highlighted by the remarkable shift in the Government's effort to distinguish strike relief from social security. In the Commissioner's 1957 ruling on strike relief, it was stated that social security was freed from tax "because it was believed that Congress intended that such benefits be not subject to tax." This argument has now been completely abandoned and replaced by a contention that, unlike strike relief, social security benefits are charitable in nature. But the very face of the social security law and its ample legislative history utterly

refute the Government's contention that social security benefits are charitable in nature. In any event, there is certainly far less of a charitable foundation for social security, paid under legal compulsion ~~without a need standard~~ and in the form of cash, than there is for strike relief provided gratuitously by the union only upon the basis of need and in the form of bare subsistence food and rent benefits rather than cash.

(ii) Application of the doctrine of equal treatment is also called for by the fact that there is no category of relief benefits, with the sole exception of strike relief, which the Commissioner has ever sought to subject to the tax. Thus, public assistance payments, Red Cross aid, employer relief and rehabilitation payments and the like have all been ruled by the Commissioner not to constitute taxable receipts.

The jury verdict approved by the decision below and the Government's total inability to demonstrate why strike relief should be taxed when social security and public and private relief has never been taxed, provide alternative grounds for affirmance without resolution of troublesome statutory "income" and "gift" contentions.

II

Strike relief receipts are not "income" under the Code. The Government's argument to the contrary rests upon the erroneous proposition that this Court's decision in *Commissioner v. Glenshaw Glass Co.*, 348 U. S. 426, held every species of receipts "gross income" under the Code. But this Court has never held, either in *Glenshaw Glass* or elsewhere, that all receipts constitute realized "gains, profits or income" within the meaning of the Code.

A. The legislative history of the income tax statute, this Court's decisions and the Commissioner's rulings all dem-

onstrate that many categories of receipts do not constitute gross income. The first Income Tax Act under the Sixteenth Amendment carried over the previous rulings and legislative history which had imposed historical limitations on the concept of income. A series of subsequent decisions by this Court has held various categories of receipts such as alimony, unrealized advances in value, life insurance proceeds, etc., not to constitute taxable income. Finally, the Commissioner himself has adhered to his early ruling that "gross income does not include everything that comes in." Rulings rendered before *Glenshaw Glass* but unaltered since, as well as rulings rendered after *Glenshaw Glass*, recognize as nontaxable: old age, unemployment, and public relief benefits under the social security system; Panama social security payments; Red Cross aid; personal injury damages; damages for breach of promise to marry and wrongful death; payment to war prisoners for mistreatment by the enemy; rehabilitation payments to employees; Nazi persecution indemnities; meals and lodging and moving expenses provided to employees; premiums paid on employee group life insurance; and farmer consumption of his own produce. Such rulings by the Commissioner speak eloquently against the proposition the Government advances here that all receipts necessarily constitute gross income under the Code. The Government having attempted no showing, aside from its misinterpretation of *Glenshaw Glass*, that the court below erroneously regarded strike relief as not income, the burden of defending that ruling has not been shifted to the respondent; yet we are also able to assume that burden and to demonstrate the eminent correctness of the holding below that strike relief does not constitute income under the Code.

B. Subsistence relief to needy strikers is in the area of merely alleviative receipts, which have never been deemed

to constitute "income." There appears to be a common denominator to the types of receipts most analogous to strike relief which have been ruled not to constitute taxable income—social security retirement, unemployment compensation, public relief, Red Cross aid, reparation payments, damage recoveries, and the like. The subtle but vital distinction between these nontaxable receipts and those which constitute taxable "gains, profits or income" is best characterized by the element of "enrichment." Unlike the windfall profit in *Glenshaw Glass*, receipts which are merely alleviative, serving as reparation for loss, hardship, injury or distress suffered by the recipient, do not fall within the concept of income either in its ordinary or historical import. The same element of alleviation is also apparent in this Court's "non-income" rulings with respect to alimony payments for the loss of support by the husband, life insurance receipts representing "a substitution of money value for something permanently lost," and a "gain" upon repayment of a loan in foreign currency whose overall use resulted in a net loss to the taxpayer. *Gould v. Gould*, 245 U.S. 151; *United States v. Sapplee-Biddle Hardware Co.*, 265 U.S. 189; *Bowers v. Kerbanah Empire Co.*, 271 U.S. 170.

If merely alleviative receipts do not represent income under the Code, certainly strike relief falls within the suggested common denominator. By no stretch of the imagination does bare subsistence relief to strikers and their families constitute any enrichment or profit. Under these circumstances, and especially since the Government has not even attempted an argument (other than its misreading of *Glenshaw Glass*) in support of its view that strike relief constitutes taxable income under the Code, it is submitted that the ruling below should be affirmed on the "income" issue.

~~Strike relief~~ constitutes a gift to the needy.

A. The recipient of strike relief renders no service or obligation for the receipt of his subsistence benefits; neither striking nor payment of dues constitutes consideration for the receipt of strike relief benefits. The Government urges that the act of striking in response to an International Union "request," creates a causal relationship which requires the conclusion that strike benefits are compensation "for" striking. But the Government's conclusion that strike relief is compensation for an act requested by the International Union—going on strike—necessarily collapses with its faulty premise that the donor union requested the strike, for the strike was neither called at the request of nor for the benefit of the International Union. Moreover, since strike relief is not paid to all strikers but only to those in need, it cannot properly be deemed to constitute compensation for striking rather than relief to the needy. Finally, the fact that strike relief is discontinued when an employee finds temporary even though less remunerative employment elsewhere, that the amount of relief dispensed is too minimal to constitute any serious incentive to remain on strike, and the fact that distributions are made alike to members and nonmembers of the union, all reinforce the charitable rather than remunerative nature of subsistence benefits furnished to needy strikers and their families.

Nor is strike relief conferred, as the Government would have it, as a *quid pro quo* for the payment of union dues. While the Government urges that the union constitution contains a "contractual obligation for the furnishing of strike relief", analysis of the constitutional provision here involved demonstrates that it is in no sense contractual, and the Government itself concedes that it does not constitute an enforceable obligation. Furthermore, the Gov-

ernment also concedes that "payment" on a "contractual obligation" itself assumed as a gift rather than for consideration, will not defeat gift. It is forced therefore into an argument that *union dues* constitute "consideration" for the "obligation" to furnish strike relief; but clearly this *quid pro quo* argument is without merit. There is no relationship whatever between the quantum of dues paid and strike relief received. Respondent, for instance, never paid any dues at all prior to receiving his strike relief benefits. It is thus clear that the Government's argument that strike relief is paid as a return "for" the payment of union dues is as fallacious as its argument that strike relief is compensation "for" striking. Under these circumstances since strike relief is received gratuitously, the recipient thereof is entitled to claim the gift exemption on his subsistence food and rent benefits.

B. Contrary to the Government's alternative argument, donor expectation of return economic advantage would not defeat the gift status of strike relief gratuitously received. This Court's decisions make perfectly clear that gratuity and gratuity alone constitutes the test of gift under the Code. *Bogardus v. Commissioner*, 302 U.S. 34; *Helvering v. American Dental Co.*, 318 U.S. 322. Subsequent decisions of this Court and of lower courts, as well as rulings by the Commissioner himself, have adhered to the position that a donor's motivation of business self-interest does not defeat the gift exemption if the benefit conferred was received gratuitously.

Even if donor motivation were accepted as a test of gift, it is clear on the record here presented that strike relief is not granted by the International Union from motives of economic self-interest. Strike relief is not a covert form of furthering the business interests of the International but precisely what it purports to be—sub-

sistence relief to needy strikers and their families bestowed out of charitable considerations. Indeed, the jury so found; and the factual premises of the Government's gift arguments thus necessarily fly in the face of the record and the appropriate findings of fact by the jury and the court below.

ARGUMENT

I

This Court Should Affirm the Decision Below Upon the Basis of the Jury Verdict or Upon the Doctrine of Equal Tax Treatment, Either of Which Grounds Avoids the Necessity of Resolving Fundamental Statutory Questions Regarding "Income" and "Gifts"

In a direct attack upon the ruling of the court below, the Government would require this Court to resolve federal income tax fundamentals on two broad and sensitive fronts. In the area of what constitutes "income", the Government is asking this Court to hold that a receipt of any type, no matter from what source or how realized, constitutes taxable "income". (Gov. Br. pp. 11, 40; see *infra*, Point II, p. 27.) In the area of what is a "gift", the Government is asking this Court to impose new and far-reaching restrictions and limitations on that statutory concept. (Gov. Br. pp. 26-31; see *infra*, Point III, p. 37.) We question, however, whether this Court will be willing to resolve definitional issues regarding "income" and "gift", particularly where the Government is asking the Court to lay down rules which the Commissioner himself has not followed in practice and does not follow today. For example, the Government asks this Court to promulgate a rule that no receipts whatever are excepted from the concept of "income" in the absence of a specific statutory exemption, although the Commissioner himself has in numerous decisions construed

the Code in a manner contrary to such a rule. See *infra*, pp. 27-32.

There is additional reason why this Court will want to avoid the broad definitional resolutions the Government seems to desire in this case—the *issue of strike relief is too special and atypical a vehicle to provide the occasion for redefining such general concepts as "income" and "gift"*. Here is a special type of relief benefit, totally unlike payments made by employers or payments incidental to other normal commercial relationships to which such tax definitions are normally pertinent. The fact that this is the first case involving the taxability of strike relief which has ever come before the courts gives emphasis to its inappropriateness as the occasion for a redefinition of basic income tax concepts.

Two limited grounds of decision short of the troublesome "income" and "gift" issues are at hand for the resolution of this case. First, the jury found in a special verdict upon instructions unassailed by the Government, that respondent's relief benefits constituted a gift. Second, the Government is wholly unable to distinguish strike relief from the most analogous categories of social security and public and private relief benefits, all of which have been authoritatively ruled not to constitute taxable income, a circumstance calling for invocation of the principle of equal tax treatment. We take up these two limited grounds of decision in order.

A. The Jury's "Gift" Verdict, Rendered Upon Instructions Unassailed by the Government, Is Dispositive of This Case.

The District Court, upon instructions unchallenged by the Government, submitted to the jury the question whether the amounts received by the respondent were a gift, and the jury answered the question in the affirmative. No error

in the instructions is alleged and the verdict was clearly supported by the evidence. The Court of Appeals so held and accordingly reversed the District Court's action setting aside the verdict (R. 61-62).² We submit that the Court of Appeals was correct in deeming the characterization of strike relief benefits as "gift" to depend upon reconciliation of facts appropriately within the province of the jury.

The District Judge instructed the jury that in determining whether the strike relief given respondent constituted a gift, it should decide whether benefits were granted "to pay for services" or merely "to show good-will, esteem or kindness toward the plaintiff" (R. 42). He also directed the jury to consider whether the payments were "intended to be gratuitous, without either legal or moral obligation" (R. 42), and whether the payments were bestowed only because of "personal regard or pity or from general motives of philanthropy or charity" (R. 43).

In our view, these instructions were too favorable to the Government in permitting donor motivation, in the absence of consideration furnished by the donee, to defeat the gift status of benefits gratuitously received (see *infra*, pp. 46-54). In any event, the Government takes pains to demonstrate in its brief (pp. 26-31) the *correctness* of these criteria, which look to the motivation of the donor as the test of a gift, and upon which the jury found against the Government. Clearly, a litigant who emphasizes here the correctness of instructions below which were more than favorable to him, can hardly complain of the jury verdict predicated thereon.

In his instructions to the jury, the District Judge had stated that "whether the receipts were gifts is primarily

² This Court stated in *F.T.C. v. Standard Oil Co.*, 355 U.S. 396, 400 (1958): "proper decision of the controversy depends upon a question of fact and therefore we adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of 'circumstances which admit of different interpretations.'" See also *Pearlfoxy v. Commissioner*, 358 U.S. 59 (1958).

"a question of fact to be resolved under the peculiar circumstances of this case" (R. 42). In so doing, the District Court followed the views of this Court, stated in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949):

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them . . . It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design."³

In *Peters v. Smith*, 221 F. 2d 721, 725, a District Judge had set aside a jury verdict that a retirement annuity purchased by an employer for an employee was a gift. The Third Circuit reversed, Judge Hastie, speaking for the Court of Appeals, stating:

"As we view the record, the employer in providing the questioned payments did not indicate unequivocally whether such action was intended as additional compensation for past services, or merely as an expression of a philanthropic attitude, or as a bid for employee good will, or as some combination of these. Therefore, 'it was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct.' See Brandeis, J., in *Bogardus v. Commissioner*, *supra*, 302 U.S. at page 45."

³ Questions of motive bearing on tax issues have been considered questions of fact. See, e.g., *Crossley v. Campbell*, 184 F. 2d 639 (7th Cir. 1950); *Lannan v. Kelm*, 221 F. 2d 725 (8th Cir. 1955); *United States v. Fewell*, 255 F. 2d 496 (5th Cir. 1958); *Keefe v. Cote*, 213 F. 2d 651 (1st Cir. 1954); *Jones v. Griffin*, 216 F. 2d 885 (10th Cir. 1954). The Commissioner recently acquiesced (C.B. 1958-2, 8) in a Tax Court determination that the issue of gift "is one of fact." See *J. Marion Wright*, 30 T.C. 392 (1958).

The Government contends in the face of the conclusive jury finding, that "it is essential as a practical matter" that the question of gift be here treated as one of law on the ground that "it is obviously necessary for the Commissioner to adopt a uniform rule for administrative purposes" (Gov. Br. p. 51). But this Court cannot establish a principle of law predicated on factual assumptions directly contrary to the facts found by a jury upon instructions more than favorable to the Government. Possibly the Government is asking this Court to close its eyes to the jury's unassailed findings; possibly it is asking this Court to formulate generalizations bearing only on future strike relief cases whose facts may differ from those in the present case. We cannot believe that this Court will follow either course.

In seeking to avoid the force of the jury finding by insisting upon "a uniform rule for administrative purposes," the Government is apparently asking this Court to declare that no strike relief under any circumstances can ever be held a gift. The jury's finding of gift on unassailed instructions highlights the difficulties inherent in the Government's insistence upon a uniform rule. In the instant case the jury may well have considered, and quite properly so, the fact that respondent was not even a member of the union when he was found eligible to receive strike relief. Certainly another consideration in determining the "gift" issue in any particular strike relief case is the source of the benefits involved. Thus, in the instant case the bulk of the relief funds involved did not come from the local union which had initiated the strike, but rather from the International Union. In still other cases strike relief funds come from outside unions, friends of labor and even the public at large.

For example, where a union is new or in need of assistance, most or all aid must ordinarily come from outside

sources—not necessarily from organized labor. In the early history of the UAW it required just such outside assistance. The National Committee to Aid Families of General Motors Strikers, Inc., collected money from individual donors, independent of any labor union, for the assistance of needy UAW strikers.⁴ This assistance was the subject of a ruling dated February 13, 1946, which is reproduced in Appendix A to this Brief, *infra*, p. 60. The ruling holds that donations by individuals to this Committee are deductible by the donors as charitable “gifts”.⁵

In the recent steel strike many labor organizations made substantial contributions to relieve the distress of the steel workers. The United Automobile Workers gave \$1,000,000; the Industrial Union Department of the AFL-CIO \$1,000,000; the Amalgamated Clothing Workers of America \$1,000,000; the Communication Workers \$100,000 (and pledged an additional \$100,000 for each month of the strike); the Electrical, Radio and Machine Workers \$100,000; the Textile Workers \$100,000; the Building Service Employees \$100,000; the Retail Clerks \$100,000; the Railroad Workers (4 unions) \$100,000; the Newspaper Guild \$25,000; the National Maritime Union \$10,000; the Utility Workers' Organization \$25,000; the Commercial Telegraphers \$15,000; the Transport Workers \$25,000; and the Pulp-Sulphite Workers \$10,000. See Proceedings, Third Constitutional Convention, AFL-CIO (9-17-59) p. 25; (9-22-59 morning) p. 70; *AFL-CIO News* (10-3-59) p. 3; (10-17-59) p. 1; (10-24-59) p. 1; (10-31-59) p. 3. The American Federation

⁴ In the long drawn out 1949 strike against the Smoot Sand and Gravel Company of the District of Columbia, a “Committee of Citizens” raised funds to give relief to strikers’ families. This Committee was revived in the 1958 strike against the same company and again provided relief to the strikers. See the *Washington Post and Times Herald*, October 7, 1958.

⁵ Obviously donations by this Committee to relieve needy strikers were equally exempt as gifts and the Government so concedes (Br. 25, n. 13).

of Government Employees made a contribution of an unpublished amount. *Government Standard* (11-20-59) p. 2. A labor organization in Israel gave \$10,000. *The Wall Street Journal*, September 8, 1959. Upon individual solicitation at plant gates, the workers at a Chevrolet plant donated \$2,100; those at a Ford plant \$1,500. *AFL-CIO News* (10-10-59) p. 3. The Colorado Springs Trades Council contributed groceries of a value of \$1,000 donated by grocery stores, churches and union members. *AFL-CIO News* (10-24-59) p. 3.

The highly significant differences between strike relief conferred from various sources under varying circumstances and conditions underline the wisdom of this Court's adherence to its policy of case by case determination and the impossibility of substituting some "uniform rule" for the jury verdict. The jury having determined upon instructions the Government deems to be correct that the strike relief here in issue constituted a gift to respondent, the ruling below should be affirmed on this clear and narrow ground.

B. Affirmance Is Required by the Doctrine of Equal Treatment, Since the Most Analogous Social Security and Public and Private Relief Benefits Are Not Subject to Tax.

Congress spends a great deal of its time eliminating discrimination in tax treatment between taxpayers similarly situated.⁶ "A cardinal principle of Congress in its tax

⁶ Only a few recent examples need be cited. In the Technical Amendments Act of 1958, 72 Stat. 1606, a number of provisions were expressly designed to accomplish just this purpose. See sections 28, 65 and 93 of the Act, explained in S. Rep. No. 1983, 85th Cong., 2d Sess., 42-44, 158-159, 89-90, 226-27, 106-107 and 240-242. The Ways and Means Committee has been holding recent hearings on tax reform to seek, in the words of Chairman Mills, "greater equity through closer adherence to the principle that equal income should bear equal tax liabilities." Vol. 1, Tax Revision Compendium submitted to Committee on Ways and Means, p. ix (1959).

scheme is uniformity, as far as may be." *United States v. Gilbert Associates*, 345 U.S. 361, 364 (1953). This Court has on numerous occasions exerted its power to prevent frustration of the Congressional scheme of uniformity. See e.g. *Commissioner v. Sullivan*, 356 U.S. 27, 29 (1958); *Libson Shops Inc. v. Koehler*, 353 U.S. 382, 389-90 (1957); *Haynes v. United States*, 353 U.S. 81, 84 (1957); *United States v. Gilbert Associates*, 345 U.S. 361, 364 (1953); *Lyeth v. Hoey*, 305 U.S. 188, 194 (1938). The Treasury Department, likewise, recognizes that similarly situated taxpayers should receive equal treatment.⁷ Yet the Commissioner has departed from the principle of equal treatment in the instant case for no apparent reason, compelling or otherwise.

(i) The Commissioner has long held that social security benefits are nontaxable.⁸ Recently the Commissioner expanded that position by ruling that sickness, maternity, disability, old age and death benefits paid by the Republic of Panama "do not constitute taxable income . . . for Federal income tax purposes." Such benefits were "deemed to be basically similar to the sundry insurance benefit payments made to individuals under the United States social security system."⁹

⁷ For instance, on December 4, 1959, Jay W. Glasmann, Assistant to the Secretary of the Treasury, stated that it was a "basic" concept "of a sound tax system" that "taxpayers who are similarly situated should be treated alike." Address to Symposium of the Tax Institute Incorporated.

⁸ T. D. 6272, Section 1.61-11(b), C.B. 1957-2, 18, 30; I.T. 3447, C.B. 1941-1, 191 (retirement benefits); I.T. 3194, C.B. 1938-1, 114 (lump-sum benefits); I.T. 3229, C.B. 1938-2, 136 (lump-sum death benefits); I.T. 3230, C.B. 1938-2, 136; Rev. Rul. 55-652, C.B. 1955-2, 21 (unemployment compensation). The exclusion of Social Security retirement benefits from tax was referred to by the Ways and Means Committee and the Senate Finance Committee as "existing law". H.R. No. 1337, 83d Cong., 2d Sess., 7; S. Rep. No. 1622, 83d Cong., 2d Sess., 8.

⁹ Rev. Rul. 56-135, C.B. 1956-1, 56. This is another example of a situation where the Commissioner applied the doctrine of equal treatment.

We submit that if old age, unemployment and similar benefits under the social security system are not taxable, strike relief based on need is an *a fortiori* case. Nontaxable social security retirement and unemployment benefits are paid as a matter of right in an amount which is based upon and arises because of the employee's previous earnings, and is generally intended to compensate for loss of livelihood because of retirement or unemployment. Thus, even if strike benefits were paid as a matter of right, they would still not be taxable under the social security analogy. Surely, then, strike relief furnished not as a matter of right, but upon the basis of the need of the individual recipient and his family, and completely unrelated to the individual's former earnings, is even more remote from taxable income. Moreover, social security retirement benefits are paid from a fund which is derived from contributions of employers and employees, whereas the strike relief in this case was given to respondent from a fund to which neither he nor any employer made any contribution.

The Commissioner's obvious departure from the principle of equal tax treatment is highlighted by a remarkable shift in the Government's effort to distinguish strike relief from nontaxable social security benefits. In the Commissioner's 1957 ruling holding strike relief taxable, he distinguished social security benefits on the ground that "the benefits in these cases were held not to constitute taxable income because it was believed that Congress intended that such benefits be not subject to tax." Rev. Rul. 57-1, C.B. 1957-1, 15, 16. But neither the Commissioner nor anyone else has ever found anything in the social security law or its legislative history which even hints at such a Congressional intention and the Government has now totally abandoned the Commissioner's specious distinction. Instead, the Government now seeks in this Court to distinguish social security payments from strike relief on a ground never even suggested

by the Commissioner—on ~~an~~*ipse dixit* that social security payments are charity and strike relief is not (Gov. Br. p. 10). But, if anything, the situation is clearly the reverse; for as the statute and its legislative history make clear, old age and unemployment payments were never intended to be and are not charity, while strike relief clearly is charitable in nature.¹⁰

When the Social Security Act was first enacted, the House Ways and Means Committee expressly stated that the purpose of old age and survivors' insurance benefits was "to assure support for the aged as a right rather than as public charity, and in amounts which will insure not merely subsistence but some of the comforts of life." H. Rep. No. 615, 74th Cong., 1st Sess., 5 (1935); see also S. Rep. No. 628, 74th Cong., 1st Sess., 7 (1935).¹¹ Indeed, under the old age and

¹⁰ The Government defines charity in a "special sense," for this occasion, as "a concern for the public good, untainted by motives of private advantage" (Br. 10, n. 1a). We confess our inability to understand how this definition converts retirement and unemployment benefits under the federal social security system into charitable gift, unless every disbursement by the United States is charity in a "special sense," since all disbursements are assumed to be for "the public good." Indeed, viewing as does the Government in its brief, the "donor" of social security as the United States, it is also perfectly clear that there is tangible "advantage" to the United States flowing from the stabilizing influence of the social security system, which was a primary purpose of its enactment.

¹¹ After the old age and survivors' insurance system had been in operation a number of years, the Ways and Means Committee, in discussing the bill which became the Social Security Act Amendments of 1950, commented: "Because benefits under the insurance system are paid as a matter of right following cessation of substantial covered employment, the worker's dignity and independence are preserved. . . . Because benefits are geared to contributions, the pressure for an unwarranted scale of payments is held at a minimum." H. Rep. No. 1300, 81st Cong., 1st Sess., 2, 3.

In 1954, the Ways and Means Committee stated: "The knowledge that benefits will be paid irrespective of whether the individual is in need supports and stimulates his own thrift and initiative, since he can add his personal savings (including home ownership and insurance) as well as pensions he may receive as a result of his work, to the basic old-age and survivors insurance benefits." H. Rep. No. 1698, 83rd Cong., 2d Sess., 2.

survivors insurance system, employers, employees and the self-employed pay the taxes from which the retirement benefits are derived. See 42 U.S.C. § 401. The United States does not contribute. Benefits are geared to covered wages or self-employment income,¹² so that the system is financially sound.¹³ If taxes are not paid with respect to an individual's earnings because he is not covered under the system, he is not entitled to benefits regardless of his need.¹⁴ An eligible individual receives retirement benefits even if he has an enormous investment income. Clearly then, social security retirement benefits do not constitute charitable gratuities.¹⁵

So also, unemployment benefits are paid as a matter of right without reference to need or to other sources of income.¹⁶ The Report of the House Committee on Ways and

¹² Social Security Act, Sections 202, 215, 42 U.S.C.A. Section 402, 415. See *Social Security Board v. Nierotko*, 327 U.S. 358, 361 (1946).

¹³ For latest statements, see H. Rep. No. 2288, 85th Cong., 2d Sess.; S. Rep. No. 2388, 85th Cong., 2d Sess.

¹⁴ See *United States v. Silk*, 331 U.S. 704, 710-711 (1947); 42 U.S.C. § 403(b), (c), (e).

¹⁵ The Commissioner placed under Section 61(a) of the Code the portion of the Regulations which hold social security retirement benefits nontaxable. See Section 1.61-11(b), C.B. 1957-2, 18, 30. Generally, a regulation is inserted under the provision of the code which it is intended to interpret. See Reg. 118, Explanation of Regulations. Ordinarily, if the Commissioner excludes a receipt from income because it is a gift, he so states. See Rev. Rul. 56-610, C.B. 1956-2, 25 (state bonus to veteran held to be a gift); Rev. Rul. 57-233, C.B. 1957-1, 60 (grant by United States to certain Indians for relocation and vocational training held to be a gift). The Government's belated effort to explain the nontaxability of social security payments as charitable gratuities is thus defeated by the very placement of the nontaxability ruling in the Regulations.

¹⁶ As stated in the comprehensive discussion by Burns, "Unemployment Compensation and Socio-Economic Objectives," 55 Yale L. J. 1, 2:

"unemployment compensation makes cash payments to unemployed workers as a right under more or less clearly defined conditions which do not include, however, the requirement that the recipient undergo a test of need."

Means relative to the Social Security Act (H. Rep. No. 615, 74th Cong., 1st Sess., p. 7) made clear that no need element inheres in the unemployment compensation scheme:

"Unemployment insurance cannot give complete and unlimited compensation to all who are unemployed. Any attempt to make it do so confuses unemployment insurance with relief, which it is designed to replace in large part. . . . Unemployed workmen who cannot find other employment within reasonable periods will have to be cared for through work relief or other forms of assistance, but unemployment compensation will greatly reduce the necessity for such assistance. Unemployment compensation is greatly preferable to relief because it is given without any means test. It is in many respects comparable to workmen's compensation, except that it is designed to meet a different and greater hazard."¹⁷

It is clear, therefore, that the Government's attempted "charity" distinction of the social security rulings is without substance. But even were the Government correct in its designation of social security benefits as charitable in nature, that would not provide any cogent distinction between social security and strike relief, for the latter is no less charitable than the former. Certainly there is no

¹⁷ Unemployment compensation, ordinarily derived from employer payments, highlights the inconsistency of the Government's position. Some states, New York for example, allow unemployment compensation to strikers. New York Labor Law, § 592. Suppose an employer operates plants both in New York City and across the state line in Stamford, Connecticut, and the union calls a strike. On the Government's theory the striker who receives unemployment compensation in New York on the basis of right and in an amount directly related to his prior earnings is not receiving taxable income. Yet the striker in Connecticut who gets no unemployment compensation but receives strike relief, would be receiving taxable income even though he receives the relief on the basis of need and in an amount unrelated to his prior earnings.

more of a charitable foundation to social security, paid under legal compulsion without a need standard and in the form of cash, than there is to strike relief provided gratuitously by the union only upon the basis of need and in the form of bare subsistence food and rent payments rather than cash.

Thus, even accepting the Government's fallacious "charity" argument, it is clear that no tangible distinction has yet been suggested which would justify the taxation of strike relief benefits while the related categories of benefits under the social security system are freed from the tax. And the unequal treatment to which the Commissioner would subject strike relief benefits is further highlighted by the fact that this is actually the first instance where the Commissioner has ever sought to impose tax upon subsistence relief.

(ii) If there is anything demonstrated by Congressional and administrative history in this area, it is the fact that subsistence relief has never been deemed a proper source of federal revenue. For instance, the Commissioner has ruled definitively that public assistance payments in the nature of relief to the needy, aged, blind, dependent and disabled persons are not taxable. Rev. Rul. 57-102, C.B. 1957-1, 26. Red Cross aid has likewise been ruled not to constitute taxable income. Special Ruling of IRS, 5 Stan. Fed. Tax. Rep. (1952) Par. 6196. Equally significant is the Commissioner's determination in Rev. Rul. 131, C.B. 1953-2, 112, that an employer's relief or rehabilitation payments to his employees who had suffered losses in a tornado, were not taxable under the Code. The Commissioner emphasized that such payments by an employer were "measured solely by need." Finally, we have been unable to discover any category of relief benefits whatever, with the sole exception of strike relief, upon which the Commissioner has

ever sought to encroach by the assessment of tax thereon.¹⁸

Under these circumstances the principle of equal or uniform tax treatment is unquestionably controlling. We do not believe that the Government will urge that subsistence relief has in any other area been subjected or sought to be subjected to income tax nor can we conceive of any reason why among all categories of public and private relief benefits, only those to needy strikers should be a source of federal income. The suggestion that Congress meant to derive revenue by levies upon subsistence food and rent to needy strikers and their families is as strained and surprising as the suggestion so definitively laid to rest by the Commissioner himself, that Congress desires to obtain revenue from Red Cross aid, public assistance and similar relief benefits. No more than these related categories of subsistence aid can strike relief be regarded as a legitimate source of revenue for the nation.

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It is submitted that the jury verdict approved by the decision below and the Government's inability to demonstrate why strike relief benefits should be taxed when social security and public and private relief has never been taxed, provide alternative grounds for affirmance without resolution of fundamental "income" and "gift" contentions. If, however, this Court should nevertheless determine to reach the broader issues which the Government would require it to decide, it is clear that the Court of

¹⁸ It should here be noted that the Treasury regulations define as "charitable" "relief of the poor and distressed or of the underprivileged" and "lessening of the burdens of Government". Income Tax Regulations § 1.501(c)(3)—1(d)(2). While we have heretofore demonstrated the untenability of the Government's "charity" differentiation of benefits similar to strike relief, it should be noted that the Regulations themselves seem to recognize no distinction between relief and assistance benefits derived from public and those from private sources.

Appeals correctly ruled that the strike relief received by respondent did not constitute gross income within the meaning of the Code and is, in any event, exempt from taxation as a gift.

II

Strike Relief Receipts Are Not "Income" Under the Code

The court below held that strike relief receipts are not "income" within the meaning of Section 61(a) of the Code. The Government attacks this ruling, urging that this Court's decision in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, stands for the proposition that any species of receipt or gain, of whatever nature or source, is necessarily "gross income" under the Code unless specifically excepted by the statute (Gov. Br. 39-40). We question whether this Court's generalization in *Glenshaw Glass* that realized gains constitute taxable income can be taken from the context in which the issue was presented to the Court in *Glenshaw Glass* and applied to every other species of realized gains. In any event, the Government's assertion that all realized gain constitutes gross income under the Code begs the critical question whether strike relief constitutes realized gain. *This Court has never held that all receipts constitute realized gain within the statutory language of "gains, profits or income"; indeed it has held precisely to the contrary* (see *infra*, pp. 29-30). As we demonstrate in Section A herein, the legislative history, this Court's decisions, and numerous rulings by the Commissioner himself, all make clear that there are categories of receipts which do not constitute "realized gain" or "income" to the recipient. And in Section B of our discussion, we show that subsistence strike relief benefits fall within the category of alleviative receipts—a category lacking the quality of *enrichment* to the recipient which

appears to be a necessary ingredient of the concept of "gains, profits or income."

A. The Legislative History, This Court's Decisions, and the Commissioner's Own Rulings Demonstrate that Many Categories of Receipts Do Not Constitute Gross Income.

As this Court stated in *Glenshaw Glass* (p. 431), in analyzing its earlier characterization of "income" in *Eisner v. Macomber*, 252 U.S. 189, 207 (1920): "The definition served a useful purpose" in "that context . . . but it was not meant to provide a touchstone to all future income questions." In our view, this Court's statement in *Glenshaw Glass*—a case involving a punitive damage recovery under the Sherman Act—that Congress intended "to tax all *gains* except those specifically exempted" (p. 430) was not meant to imply that all *receipts*, whatever the nature thereof, necessarily constitute gross income.

(i) The statutory definition in the 1939 Code, Section 22(a), of "gains or profits and income derived from any source whatever"¹⁹ stems from Civil War income tax legislation. Section 90 of the Income Tax Act of July 1, 1862 (12 Stat. 473), imposed a tax on "gains, profits or income" derived from various specified sources or "from any other source whatever". This language, however, was apparently not intended to reach all receipts. The Treasury accordingly held in its early regulations that under the broad language of "gains, profits or income", legacies and testamentary

¹⁹ The successor provision of the 1954 Code, section 61(a), provides that "gross income means all income from whatever source derived". This Court recognized in *Glenshaw Glass* that "no effect" was intended by the change in language (p. 432). But it is worthy of note that the spelling out in the 1954 Code of 15 categories of gains included in gross income would hardly have been necessary under the Government's all-inclusive definition of the words "income from whatever source derived."

gifts, life insurance proceeds, and personal tort damages are not income.²⁰

The first income tax act under the Sixteenth Amendment, the Revenue Act of 1913 (Section 11B, 38 Stat. 167), adopted the "gains, profits or income" definition of the Civil War legislation as the base for the imposition of the tax. In the debate prior to enactment, Congressman Cordell Hull, floor manager of the bill, stated (59 Cong. Rec. 506) "It would be impossible here to undertake to explain the application of this provision of the bill to the innumerable transactions arising in this country." For specific application of the general provisions, Congressman Hull directed attention to "the rulings of the Treasury Department and the decisions of the courts of this country with respect to similar provisions of the old income laws, and also the English rules of construction, all essential portions of which will be embraced in the Treasury regulations . . ."

It is clear that in the post-16th Amendment revenue laws Congress intended to carry over and preserve recognized limitations on the concept of income. Cf. *Lyuch v. Tarrish*, 247 U.S. 221, 229-230 (1918). As subsequent decisions of this Court and administrative interpretations by the Commissioner make clear, the statutory definition of income has never lost its flexibility and does not today, any more than in 1913, render every species of receipts "gross income" within the meaning of the Code.

(ii) As early as 1918 this Court stated in *Southern Pacific Co. v. Lowe*, 247 U.S. 330, 335:

"We must reject in this case, as we have rejected in cases arising under the Corporation Excise Tax Act

²⁰ See Wright, *The Effect of the Source of Realized Benefits upon the Supreme Court's Concept of Taxable Receipts*, 8 Stan. L. Rev. 164, 171.

... the broad contention submitted in behalf of the government that all receipts—everything that comes in—are income within the proper definition of the term ‘gross income’ ”²¹ (emphasis supplied).

In a line of decisions this Court has spelled out and upheld the “non-income” character of various types of receipts. Among those it has held not to constitute gross income are alimony receipts,²² gains arising from unrealized advances in value,²³ life insurance proceeds,²⁴ and subsidies paid for constructing a railroad and a factory.²⁵ We do not understand the Government to contend that *Glenshaw Glass* has the effect of overruling all these decisions of this Court. Indeed, the continuing validity of treating categories of receipts as not “income” received this Court’s explicit recognition in *Glenshaw Glass* itself; the Court there adverted with approval to “the long history of departmental rulings holding personal injury recoveries nontaxable . . .” (348 U. S. at 432, n. 8). Thus in the very case on which the Government relies, this Court recognized the validity of administrative interpretations holding cate-

²¹ More recently in *Commissioner v. Jacobson*, 336 U.S. 28, 38 (1949), this Court reemphasized that:

“The first test of the taxability of such gains relates to their inclusion within the gross income of the taxpayer under Section 22(a) without reference to the specific exclusions made from it by Section 22(b). The other test consists of the application to such gains of any of those specific exclusions” (emphasis supplied).

²² *Gould v. Gould*, 245 U.S. 151 (1917).

²³ *Doyle v. Mitchell Brothers Co.*, 247 U.S. 179 (1918). The Solicitor General argued that gross income is equivalent to gross receipts. 247 U.S. at 183-184; see also *Commissioner v. Weisman*, 197 F. 2d 221 (1st Cir. 1952); *Lela Shullenger*, 11 T.C. 1076 (1948) acq. C.B. 1952-2, 3.

²⁴ *United States v. Supplee-Biddle Hardware Co.*, 265 U.S. 189 (1924).

²⁵ *Edwards v. Cuba Railroad Co.*, 268 U.S. 628 (1925); Cf. *Brown Shoe Co. v. Commissioner*, 339 U.S. 583 (1950); *Detroit Edison Co. v. Commissioner*, 319 U.S. 98 (1943). In *Helvering v. Ind. Life Ins. Co.*, 292 U.S. 371 (1934), the Court held that the rental value of a building was not income to the owner.

gories of receipts not to constitute income.²⁶ These and other administrative rulings emphasize the implausibility of the Government's suggested all-encompassing interpretation of "income"—an interpretation which the Commissioner himself refuses to accept.

(iii) In an early ruling after the adoption of the Sixteenth Amendment, the Internal Revenue Service stated: "The Supreme Court has repeatedly held that gross income does not include everything that comes in." Sol. Op. 132, C.B. I-1, 92, 94 (1922). Numerous subsequent administrative rulings by the Commissioner specify categories of receipts which do not constitute gross income. Rulings rendered before *Glenshaw Glass* but unaltered and adhered to by the Commissioner since that decision, as well as rulings rendered after *Glenshaw Glass*, recognize as non-taxable: old age, unemployment and public relief benefits under the social security system,²⁷ Panama social security payments,²⁸ Red Cross aid,²⁹ personal injury damages,³⁰ damages for breach of promise and alienation of affections,³¹ an award for wrongful death,³² payments to

²⁶ Subsequently, this Court expressly recognized in *Commissioner v. Lo Jue*, 351 U.S. 243, 248, that "gain" derived from a purchase at a bargain price below value does not constitute taxable income.

²⁷ See p. 8, *supra*.

²⁸ See p. 8, *supra*.

²⁹ Special Ruling of I.R.S., 5 Stan. Fed. Tax. Rep. (1952) Par. 6196.

³⁰ C. A. Hawkins, 6 B.T.A. 1023 (1927); Sol. Op. 132, I-1, C.B. 92.

³¹ G.C.M. 4363, C.B. VII-2, 185 (1928); I.T. 2422, C.B. VII-2, 186 (1928); Sol. Op. 132, C.B. I-1, 92 (1922). In fact the Commissioner originally held that damages for breach of promise to marry and alienation of affections were income. Damages for breach of contract were income because the benefits of which the injured party was deprived were merely anticipatory rather than "a return of capital" O.D. 501, C.B. 2, 70 (1920). Damages for alienation of affections were income because "from no ordinary conception of the term can a wife's affections be regarded as constituting capital." S: 1384, C.B. 2, 71, 72 (1920). The Commissioner reversed himself in G.C.M. 4363 and Sol. Op. 132 on the theory that these recoveries are not income.

³² I.T. 2420, C.B. VII-2, 123 (1928); Rev. Rul. 54-19, C.B. 1954-1, 179.

war prisoners for mistreatment by the enemy,³³ rehabilitation payments by an employer to his employees,³⁴ Nazi persecution indemnities,³⁵ meals and lodging and reimbursement of moving expenses provided to employees for the convenience of the employer,³⁶ premiums paid by an employer on employee group life insurance,³⁷ and farmer consumption of his own produce.³⁸ Such rulings by the Commissioner himself speak eloquently against the proposition advanced by the Government here, that all receipts necessarily constitute gross income under the Code.

The foregoing demonstration that there are significant areas of non-income receipts is, we submit, dispositive of the instant case. In disputing the holding of the court below that strike relief is not income, the Government has chosen to rely *exclusively* upon its interpretation of *Glen-shaw Glass* that all receipts are income and that strike relief must therefore be income.³⁹ The Government's sole

³³ Rev. Rul. 55-132, C.B. 1955-1, 213.

³⁴ Rev. Rul. 131, C.B. 1953-2, 112. It should be noted that the ruling specifically recognizes that the benefits involved were not income under "Section 22(a) of the Code."

³⁵ Rev. Rul. 56-518, C.B. 1956-2, 25.

³⁶ If the meals and lodgings are not for the convenience of the employer they constitute additional compensation and are, of course, taxable. *Diamond v. Storr*, 221 F. 2d 264 (2d Cir. 1955); *Saunders v. Commissioner*, 215 F. 2d 768 (3d Cir. 1954); *Jones v. United States*, 60 Ct. Cl. 552 (1925); Reg. 111, Section 29.22(a)(3); Reg. 118, Section 39.22(a)(3). Section 119 of the 1954 Code now grants an exclusion subject to specified conditions. See *Boykin v. Commissioner*, 260 F. 2d 249 (8th Cir. 1958). The moving expense ruling is Rev. Rul. 54-429, C.B. 1954-2, 53.

³⁷ T.D. 6272, Section 1.61-2(d)(2), C.B. 1957-2, 18, 21; L.O. 1014, C.B. 2, 88 (1920); Rev. Rul. 56-400, C.B. 1956-2, 116; Rev. Rul. 55-357, 1955-1, 13.

³⁸ See Rev. Rul. 56-496, C.B. 1956-2, 17; *Farmers Tax Guide*, IRS Pub. No. 225 (1960 ed.) p. 27; *Homer P. Morris*, 9 B.T.A. 1273 (1928).

³⁹ The Government's four-sentence afterthought (at p. 42) that strike relief might be income to respondent under *Eisner v. Macomber* as "compensation" for his striking rests on the Government's faulty assumption "that respondent performed acts requested by the union"—that strike

attack on the ruling below having failed, respondent would not appear obligated to go further and demonstrate the correctness of that ruling. We are, however, prepared to demonstrate the eminent correctness of the holding below that strike relief does not constitute income subject to the tax.

B. Subsistence Relief to Nedy Strikers Is in the Area of Merely Allervative Receipts, Which Have Never Been Deemed to Constitute Income Under the Code

The various categories of receipts which the Commissioner has deemed, both before and after *Glenshaw Glass*, not to be subject to income tax do not represent arbitrary exceptions to the concept of income. Rather, we believe, there is a common denominator running through the recognized categories of non-income receipts, applicable to strike relief as well.

The types of receipts most analogous to strike relief—social security retirement, unemployment compensation, public relief, Red Cross aid, reparation payments, personal damage recoveries, and the like—have all been regarded by the Commissioner as receipts which do not constitute income. Why have these analogous areas of receipts not been regarded as income subject to the tax? The answer, we believe, must rest upon the ultimate fact that Congress has never given content or definition to the terms "gains, profits or income", but has rather relied upon and adopted the ordinary understanding of these terms as they are used in common parlance.

What is the subtle but vital distinction between "re-

relief is "compensation" for striking, i.e., for refraining from work. This contention, one the Government rests on the closeness of the relation between striking and benefits, of which the Government makes much in its analysis of the "gift" issue, is answered *infra* at pp. 38 to 41.

ceipts", and "gains, profits, or income"? We submit that the element of distinction is best characterized as that of "enrichment".⁴⁰ Receipts which are merely *alternative*, serving as reparation for loss, hardship, injury or distress suffered by the recipient, simply do not fall within the ordinary concept of "gains, profit, or income," all of which import an element of net accretion or real enrichment. Here too is the distinction between *Glenshaw Glass* and the numerous administrative exclusions of receipts from income to which the Commissioner has continued to adhere. The punitive damage recovery in *Glenshaw Glass* was unquestionably a real profit to the recipient (indeed, a wind-fall profit) which, just like the profit derived from labor or capital, is properly deemed to be "gain" or "income". By contrast, most of those categories of receipts treated by the Commissioner as not income lack any element of enrichment or real profit, and constitute mere alleviation of loss, hardship, distress, or injury actually suffered. The alleviation factor present in the rulings on social security retirement, unemployment compensation, public relief, Red Cross aid, and personal injury damage recovery is obvious and requires no elaboration. In the same vein, employer rehabilitation payments to employees represent alleviation of actual hardship suffered; payments to war prisoners for enemy mistreatment are monetary recompense for personal injury and suffering, as is compensation paid by Germany to former citizens for "damage to life, body, health, liberty, rights of property ownership, or to professional or economic advancement" which was ruled after

⁴⁰ The very first definition of income by the floor manager of the 1861 Act, as the "net profits of a man for the year . . ." (Congressional Globe, 37th Cong., 1st Sess., 315) reveals the essence of the concept of income not as the receipt of money but as the receipt of profit. This Court itself has construed the word "income" as it is known "in the common speech of men." *United States v. Safety Car Heating Co.*, 297 U.S. 88, 99 (1936).

Glenshaw Glass not to be income to the recipient. Rev. Rul. 56-518, C.B. 1956-2, 25.⁴¹

Nor has this common denominator of alleviation, as distinguished from enrichment, been absent from this Court's decisions. Thus, in *Gould v. Gould*, 245 U.S. 151, the "non-income" alimony was directed to relieving a divorced wife from the loss of her husband's support. In *United States v. Supplee-Biddle Hardware Co.*, 265 U.S. 189, 195, the life insurance receipts held not to be income to the employer were but a recompense for the loss of a valued employee—as this Court pointed out, "a substitution of money value for something permanently lost . . .". Similarly, in *Bowers v. Kerbaugh-Emper Co.*, 271 U.S. 170, a diminution in value of foreign currency resulting in a "gain" upon repayment of a loan was held not to be income because the overall use of the money resulted in a net loss.⁴²

If we are correct that receipts which do not constitute enrichment to the recipient, but merely alleviation of his hardship, need, or loss actually suffered, are not "income", certainly strike relief falls within the suggested common denominator. As has been demonstrated, all that strike relief represents is alleviation of the hardship and impoverishment to which needy workers and their fam-

⁴¹ In *Glenshaw Glass*, 348 U.S. at 131, n. 8, this Court referred to the rulings which held personal injury recoveries as nontaxable because they "roughly correspond to a return of capital" and were compensatory in nature. Personal injury recoveries nonetheless unquestionably constitute monetary receipts to the taxpayer. Moreover, it is very difficult to find a return of capital in many of the administrative rulings which fall within this area, such as damages for breach of promise to marry, money received by a parent for the surrender of custody of his minor child, an award under a wrongful death statute, payments to prisoners of war for mistreatment by captors or the compensation paid by Germany for damages for physical injury and professional or economic advancement suffered because of the Nazi persecution.

⁴² See also *Rice, Horton & Foley v. Commissioner*, 41 F. 2d 339 (1st Cir. 1930).

ilies are subjected. By no stretch of the imagination could the receipt of such relief for the bare sustenance of strikers and their families be deemed to constitute a windfall profit or enrichment, or indeed, any realized "profit" or "gain" whatever. Under these circumstances it appears clear that, like other categories of alleviative receipts representing no realized net profit to the recipient—retirement, unemployment compensation, relief, Red Cross aid, reparation payments and the like—strike relief received by needy workers is not income subject to the tax.

In the absence of any attempt by the Commissioner to reconcile his own rulings with the theory he offers this Court, we would hope that the common denominator here offered would receive the hospitable consideration of the Court.⁴³ In any event, it is clear that no distinction can be sustained between strike relief and the numerous similar benefits consistently held not to be taxable income to the recipient, and that the Government has offered no tenable distinction nor sought to make any argument on the "income" issue except its reference to *Glenshaw Glass*. Under these circumstances we submit that the ruling of the court below that strike relief benefits are not income under the Code should be affirmed.⁴⁴

⁴³ There may of course be cases that do not fit within the suggested common denominator of enrichment as opposed to alleviation. But even if this common denominator may not run through all the cases on "income", it does appear to reconcile the greatest number of them.

⁴⁴ The Government makes a half-hearted attempt to apply the re-enactment doctrine, suggesting that the administrative treatment of strike relief "is at the very least entitled to great weight" and relying upon O.D. 552, 2 Cum. Bull. 73 (1920), (Gov. Br. p. 46). But O.D. 552 held that "Benefits received from a labor union by an individual member while on strike are to be included in his gross income" (emphasis supplied). Obviously, there is nothing in O.D. 552 which required strike relief paid by a union to nonmembers to be included in gross income.

In any case, the mere lapse of time since O.D. 552 was promulgated does not justify the application of the re-enactment doctrine. As this Court said in *Glenshaw Glass*, "Re-enactment—particularly without the

If, however, that ruling should be deemed to be erroneous, it remains a fact, as the jury and the court below held, that strike relief constitutes a tax exempt gift to needy strikers and their families.

III

Strike Relief Constitutes a Gift to the Needy

The Government attacks the ruling below that strike benefits received by respondent constituted a "gift" exempt from tax. The Government argues, in the face of the jury finding to the contrary, that strike relief does not constitute a gift because it is payment "for" striking or in return "for" the obligation to pay dues. However as we demonstrate in Section A of the argument, the court below and the jury were eminently correct in finding that strike relief is given gratuitously without any return obligation or consideration flowing from the recipients to the

slightest affirmative indication that Congress ever had the *Highland Farms* decision before it—is an unreliable indicium at best." 348 U.S. 426, 431. As the court below said, "the Government has made no showing that the 1920 rule was even considered by Congress" (R. 62).

The Treasury Department itself apparently paid no attention to the obscure 1920 O.D. It was not until the 1957 edition of "Your Federal Income Tax" (the official publication of the Internal Revenue Service which is published annually for the guidance of taxpayers) that the Internal Revenue Service stated therein that strike benefits were includible in income. These booklets are represented to contain "explanations of the aspects of the Federal Income Tax laws that are most often encountered by taxpayers." "Your Federal Income Tax" (1953 edition). Foreword by Commissioner Andrews. We submit that O.D. 552 was hardly known and never enforced until 1957 and is totally without significance here.

This Court has recognized that the re-enactment doctrine is inapplicable in the absence of Congressional familiarity with the regulation involved, and that re-enactment unaccompanied by "Congressional discussion which throws light on its intended scope" is without significance. *United States v. Calamaro*, 354 U.S. 351 at 359; *Helvering v. N. Y. Trust Co.*, 292 U.S. 455, 468. If this is true with respect to regulations, how much more does it apply to an obscure and disregarded ruling.

union. The Government's second and alternative contention is that even a benefit gratuitously bestowed must be denied gift status if economic self-interest motivated the donor in bestowing the benefit. But, as we demonstrate in Section B, neither precedent nor sound tax administration warrants denial of the donee's right to claim the gift exemption for benefits received gratuitously, merely because there may be an admixture of self-interest motivating the donor in his bestowal of the gratuity.

A. The Recipient of Strike Relief Renders No Service or Obligation for the Receipt of His Subsistence Benefits.

In urging that strike relief to those in need is not distributed by the International Union gratuitously, the Government asserts that such relief is in the nature of payment "for" striking (Gov. Br. 24-25, 31-33) or, in the alternative, that it is payment in the nature of a return "for" union dues (Gov. Br. 16-18, 33-34). The jury however was eminently correct in its finding that the strike relief was given respondent simply gratuitously.

(1) Strike relief benefits are not distributed as compensation for striking

Subsistence relief to needy strikers is not compensation for striking—the relief is not given to all who are on strike but only to those who are in need. Actually, the Government explicitly recognizes that "an employee need not promise to continue on strike or undertake to perform active duties, such as picketing, to receive the payments" (Gov. Br. p. 24). Of course, the relief was limited to needy workers on strike; how could it be otherwise? The benefits were strike relief. But the fact that a gift is limited to a particular class does not thereby render it a payment "for" having entered or "for" remaining in the class.

Indeed, the Government does not contend that the restriction of benefits to needy "strikers" in itself requires their characterization as being "for" striking (Gov. Br. 25, n. 13). The Government does, however, contend that the act of striking in response to an International Union "request" creates a causal relationship requiring the legal conclusion that the benefits are compensation for striking. The Government, however, is wrong on both counts.

The strike was not called at the request of the International Union which provided the bulk of the strike relief; the strike was called by Kohler workers by secret ballot, and the International's role, far from requesting the strike, was one of restraint. It was not the International but the employees themselves who called the strike for their own benefit (see *supra*, p. 3). The Government's conclusion that strike relief is compensation for an act requested by the donor union, necessarily collapses with its faulty premise that the International Union requested the strike.

Moreover, strike relief, paid only to those in need, is not compensation for striking. Compensation carries with it the connotation of actual causal relationship between some service or promise and its remuneration. The record is clear that the relief which was given was based solely on need. Thus, a striker would receive no benefits if his wife and children went to work (R. 62), or if he received unemployment compensation (R. 32), or public assistance (R. 37), or if the striking employee found temporary work with another employer (R. 32, 61-62). The factor determining the amount of relief was the personal need, the marital status and number of dependents of the recipient (R. 23, 29, 62), not a monetary value put upon some alleged benefit to the union of the striker refraining from work. Any "value" to the union is as great in the case of a single man with substantial savings who needs no help, as it is in the case of the

man with six children and a sick wife who needs the maximum assistance possible. The strike relief could not, therefore, have been given to the taxpayer to induce him to refrain from working. If that had been the purpose, strike relief would have been made available to all rather than just those in need. Such grants to persons in need are consistent only with gift; as one court stated it: "Need is a major consideration in deciding the amount of a philanthropic award." *Peters v. Smith*, 221 F. 2d 721, 724 (3d Cir. 1955); See also *Fifth Avenue Coach Lines*, 31 T. C. 1080, 1096 (1959).

Additional demonstration of the non-compensatory nature of subsistence relief to needy strikers arises from the fact that such relief is discontinued if the employee finds other employment, temporary or permanent. Were strike relief an incentive payment to induce employees to continue to withhold their work from the struck employer, certainly the incentive would be continued for workers who have found temporary but ordinarily less remunerative employment elsewhere. Moreover, the amount of strike relief dispensed to individual workers is clearly so minimal that it cannot seriously be viewed as alternative compensation to the employee for withholding his labor. It is difficult to understand how employees earning \$100 or more per week could be induced to go or remain on strike by the remote and unappealing prospect that they may receive from the union some subsistence dole. And finally, the benevolent and non-compensatory nature of the union's relief distribution is reinforced by the fact of distribution of benefits irrespective of the recipients' nonmembership in the union.

The Government's contention that strike benefits are in the nature of compensation for striking may be tested by a recent extension of the Commissioner's position. In Rev. Rul. 58-139, C.B. 1958-1, 14, the Commissioner held that "lockout" benefits paid by a union on the basis of need to

employees locked out by their employer in the course of a labor dispute are includible in gross income. Obviously, the rationale that the strike benefits are taxable because they are compensation "for" striking is utterly inapplicable where the employer locks the employees out; for the union gains nothing from continuation of the "lockout" and its payments would not in the least influence the duration thereof. The Commissioner, however, analogized the lock-out ruling to his strike-benefit ruling on the theory that benefits paid on account of a lockout "like strike benefits, are distributed in furtherance of union objectives." This *ad absurdum* extension of the Government's "furtherance of union objectives" argument demonstrates the strained nature of its effort to find "compensation" where the operative intention is to relieve hardship, and demonstrates again that strike relief is not compensation for striking but rather subsistence relief to the needy.⁴⁵

(2) Strike relief is not conferred as a *quid pro quo* for the payment of union dues

In an alternative attempt to demonstrate "consideration," the Government postulates a theory that there is a

⁴⁵ The Government, it should be noted, is candid enough to concede that "employees are induced to strike and continue striking primarily by their own self-interest and their loyalty to the union cause, and not by the prospect of receiving strike benefits" (Br. 19). It goes on, however, to explain that by alleviating hardship, strike benefits make it "possible (or at least easier) for the employees to continue striking. . . ." (Br. 20). Nowhere else does the Government reveal as clearly as here the encompassing reach of its argument—that an International Union *cannot* bestow a gift upon needy strikers. While doubtless the Government would be happy to have this Court so proclaim, we submit that so irrational a presumption of law, one which completely overrides the actual charitable intention in this and other cases, would leave little remaining room for the operation of the gift exemption. In the greatest majority of gratuitous transactions, there is some past service or favor by the donee which the Government would deem the "consideration" which the subsequent gratuity is "compensating." The Government's all-encompassing "presumption" to serve its tax purposes underlines the virtues of the jury trial safeguard which stands in the way of its contentions.

"contract" for the payment of strike relief in exchange for dues, citing the provision of the International Union Constitution that "it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union". On the basis of this general declaration of union policy, the Government asserts that strike relief is granted under a "contractual obligation" of the members of the International Union to each other (and in a tortuous analogy to third party beneficiary concepts, to nonmembers who also receive strike relief) and it asserts that the consideration or *quid pro quo* for this "obligation" is the payment of dues to the union (Gov. Br. 16-18, 33-34).⁴⁶

(i) The contention that the union's Constitution is a contract among the 1,200,000 members of the International Union is clearly untenable. While courts have, on occasion, resorted to contract principles in resolving intra-union problems, particularly those concerning liquidation of assets on dissolution and the right to membership, the untenability of the contract theory as applied to a union Constitution *in toto* was ably demonstrated in Professor Chaffee's noted analysis, "The Internal Affairs of Associations Not For Profit," 43 Harv. L. Rev. 993, 1001-1008. As Professor Chaffee pointed out, it is perfectly clear that union constitutions are not intended to be contractual:

"The fact is that a new member does not think of himself as forming any . . . vast network of executory

⁴⁶ The very term third-party "beneficiary" emphasizes the Government's inability to demonstrate that the third party beneficiary, respondent herein, provided any dues "consideration" to the donor for his strike relief. The government does not and cannot explain, of course, how respondent who was not a member and never paid dues prior to or during the receipt of strike relief or at any time during the taxable year, furnished any *quid pro quo* therefor.

transactions with the other members, but as entering into a present relation with the association. True, it is a consensual relation, but it is not usually regarded by him as mainly promissory. It is about the same sort of contract as the *Contrat Social* of Rousseau or the Charter of Dartmouth College."⁴⁷

In any event, as the Government is itself forced to concede, nothing in the discretionary strike relief provision contained in the union's Constitution creates an enforceable right to the receipt of strike relief by anyone (Gov. Br. 17, n. 7, 34, n. 19).⁴⁸ Even if the Constitution be deemed to incorporate certain general "contractual" rights, such as the right to membership, or to assets on liquidation (see *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 618; *Harker v. McKissock*, 7 N.J. 323, 81 A. 2d 480 (1951)), the bulk of the 100-page UAW Constitution is in the nature of declaration of policy rather than of contractual obligation. Certainly the general provision concerning strike assistance falls into the policy category. It thus appears clear that the strike relief policy which the Government describes as a contractual obligation between 1,200,000 members of the UAW (and an open-ended class of non-

⁴⁷ See Summers, "Judicial Settlement of Internal Union Disputes," 7 Buffalo L. Rev. 405, 411, et seq. "The Constitution seeks to define a whole network of complex relationships in a document drawn to guide officers and members in their daily dealings rather than lawyers and judges in litigation" (*id.* at 416). As stated in *Grand International Brotherhood v. Couch*, 184 So. 173, 236 Ala. 611, to support an action predicated on a provision of a union's constitution it "must possess the essentials of a duty to do a specific act." Finding no such duty, the Court in *Brotherhood of Railroad Trainmen v. Barnhill*, 214 Ala. 565, 108 So. 456, ruled against a member who sued his union to obtain strike relief.

⁴⁸ In *Match v. Commissioner*, 209 F. 2d 390, 392 (3d Cir. 1954), the Court emphasized in finding a gift that the possibility that payment "could be stopped or changed at any time" was significant in determining that the payments were gifts.

members as well), is neither "contractual" nor an "obligation." ⁴⁹

(ii) The Government concedes that even a payment on a contractual obligation will not defeat gift if the obligation itself arises from a gift. It therefore seeks to demonstrate "consideration" flowing from recipients of strike relief—their union dues—which is said to be the "*quid pro quo*" for the receipt of strike relief (Gov. Br. 33). But strike relief is not granted by the union in any sense in exchange for the members' obligation to pay dues and, conversely, dues are not paid by members in exchange for any obligation by the union to grant strike relief benefits to them.

The value of strike benefits received, if any, bears no relationship whatever to the amount of dues paid. Some union members pay dues all their lives without ever receiving strike benefits either because they participate in no strike or because they are not in need. Some strikers, like Kaiser, receive strike benefits without ever having paid any dues at all. In a *quid pro quo* arrangement the *quantum* of the benefit received would normally bear at least some relationship to the *quantum* of the consideration given

⁴⁹ It should be noted that the Government's contract theory is not only utterly inapplicable to the respondent before this Court, but is also irrelevant with respect to strike relief donated by many national unions whose constitutions are entirely silent on the subject but which grant strike relief in the same discretionary manner as does the UAW. For example, no reference to strike relief appears in the Constitutions of the United Steel Workers, the Amalgamated Clothing Workers, the Textile Workers and the United Electrical Workers. The inapplicability of the Government's contract argument to strike relief conferred by these unions once again underlines the inappropriateness of the Government's request that this Court fashion a binding rule for future strike relief cases to the effect that they do not constitute gifts. Certainly, if, at the Government's urging, this Court should conceivably rule strike relief not to be a gift because of an alleged "contractual obligation" in the union's Constitution, it would be highly improper for the Commissioner thereafter to promulgate a general rule, applicable as well to strike relief conferred by unions whose constitutions, being silent on the subject, do not create any "contractual obligation" with respect to strike relief.

therefor. Here there is no such relationship. In a *quid pro quo* arrangement the measure of the benefits conferred would bear a relationship to the consideration therefor rather than the need of the person upon whom the benefit is conferred. Moreover, in a *quid pro quo* arrangement, the donor of the benefits would be the recipient of the consideration therefor. But strike benefits are not necessarily provided by the local union or even by the International with which it is affiliated. In the present case the cost was largely borne by the International Union, which derives its funds from many sources. The International and the locals are as distinct entities as the several states and the United States. In many instances, the sources of the strike relief include local or international unions in completely different industries, local businessmen and even members of the public. Local businessmen or members of the public cannot conceivably make strike relief funds available in response to the fact that some of the strikers paid union dues. Completely unrelated labor organizations do not provide strike relief funds because the strikers, or some of them, have paid dues to another labor organization. Certainly strike relief derived from donations by such outside entities are granted to the union and from the union to the strikers as pure gifts, as the Commissioner himself has ruled. See *infra*, Appendix A, p. 60; see also Gov. Br. 25, n. 13.

Conversely, the distribution by the union of strike relief to needy strikers and their families, both union members and nonmembers, is certainly not in consideration of or in exchange for any union dues flowing from the members to the union. Strike relief to needy strikers can hardly be denominated a return of union dues to members since the relief is distributed only to those who are in need rather than to those who have paid dues, and indeed it is equally

distributed to those in need who have never chosen to pay dues at all.

As the Government concedes, "the fact that a payment is made pursuant to an obligation does not preclude its being a gift if the obligation itself was created by a gift" (Gov. Br. 33). To whatever extent distribution of strike benefits constitutes an "obligation" of the union, it is one which it has undertaken gratuitously. Whether or not the UAW Constitution be a contract between the members in some aspects, certainly strike relief and dues are not consideration or "*quid pro quo*" for each other. That members of unions pay dues to the union does not in and of itself render it impossible for the union to distribute what are in fact and in law gratuitous benefits to members and nonmembers. Yet it is only on the proposition that everything received from a union by members and nonmembers is necessarily a return of union dues, a proposition so broad that the Government does not and cannot go so far, that the *quid pro quo* argument can succeed.

In sum, neither the act of striking nor the payment of union dues can properly be deemed to be a condition of, consideration for, or the motivating factor in, the union's distribution of food and rent assistance to needy strikers and their families. Under these circumstances, strike relief, as the jury found, is received gratuitously and constitutes a gift for purposes of the exemption from income tax.

B. Donor's Expectation of Return Economic Advantage, Even If It Existed, Would Not Defeat the Gift Status of Strike Relief Gratuitously Received.

The foregoing demonstration that strike relief is received gratuitously, without return benefit or obligation, is, we submit, dispositive on the issue of gift. Contrary to the Government's suggestion that gratuities may be de-

nied the exemption for gifts merely because of the donor's hope or expectation of some return economic benefit, this Court's decisions make clear that *gratuity and gratuity alone* constitutes the test of gift under the Code.

(i) One of the earliest pronouncements of this Court on the issue was that in *Bogardus v. Commissioner*, 302 U.S. 34 (1937), where this Court found that gratuitously bestowed honorariums to former employees of a predecessor corporation constituted tax exempt gifts. The Court emphasized (at p. 43) that there was no implicit or covert understanding at the time of the former employment relationship that there would be any additional compensation therefor, stating: "the intention was to make gifts in recognition of, not payments for, former services." Since from the point of view of the recipients the honorariums were received gratuitously and without obligation, the donor's intention to reward past services was ruled not to transform the gift to compensation.

The Government now appears to take the view that mutual gratuities between parties can be made to lose their gift status by regarding the first of the gratuities as the "past consideration" for the second. See e.g., the Government's Brief in *Commissioner v. Duberstein*, No. 376, this Term. The cases, however, do not support the Government's contention. The courts have properly followed the view adopted in the *Bogardus* decision that a donor may actually be rewarding service or benefit previously rendered by the donee, even one rendered under contract, yet its subsequent gratuitous reward constitutes not compensation but a gift.⁵⁰

⁵⁰ See e.g., cases where a congregation has made an additional award to a departing or retiring minister: *Mutch v. Commissioner*, 209 F. 2d 390 (3d Cir. 1954); *Schall v. Commissioner*, 174 F. 2d 893 (5th Cir. 1949); *Abernethy v. Commissioner*, 211 F. 2d 651 (D.C. Cir. 1954); *Hershman v. Kavanagh*, 120 F. Supp. 956 (E.D. Mich. 1953), affirmed 210 F. 2d 654 (6th Cir. 1954). The Government criticizes these cases, Gov. Br. 27,

The next important review by this Court was in *Helvering v. American Dental Co.*, 318 U.S. 322 (1943). The Court there held the gratuitous cancellation of a debtor's indebtedness by his creditors to constitute a gift exempt from income tax. The Court was explicit on the proposition that gratuity constitutes the test of "gift", stating (at p. 30) that the term

"is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear. Its plain meaning in its present setting denotes, it seems to us, the receipt of financial advantages gratuitously."

Indeed, in *American Dental* (318 U.S. at 331) this Court expressly rejected the Government's present contention that gratuitously received benefits may be denied gift status merely because of the business motives of the donor:

"The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and suf-

n. 14, although the Commissioner has agreed to follow them. Rev. Rul. 55-422, C.B. 1955-1, 14.

In *Peters v. Smith*, 221 F. 2d 721 (3d Cir. 1955), the grant of a pension to a retired employee of a large department store was held to be a gift. In *Adams v. Riordan*, 57-2 U.S.T.C. ¶ 9770 (D.C. Vt. 1957) the court found a gift in the grant of a monthly pension for life as an honorarium by the Society for the Preservation and Encouragement of Barber Shop Quartet Singing in America to its secretary upon his retirement in recognition of his many years of legal service. In *J. Marion Wright*, 30 T.C. 392 (1958), in which the Commissioner acquiesced (C.B. 1958-2, 8) a payment of \$10,000 to an attorney by a committee organized under the auspices of the Japanese Chamber of Commerce in appreciation of his services in having the California alien land acts declared unconstitutional was likewise held to be a gift. In *Cox v. Kramer*, 88 F. Supp. 835 (D.C. Conn. 1948), reimbursement by a state for expenditures incurred by a state official in defending the propriety of his actions in the course of his employment was held to be a gift.

ficient to make the cancellation here gifts within the statute."⁵¹

In *Robertson v. United States*, 343 U.S. 711 (1952), this Court more recently indicated its adherence to gratuity as the measure of gift. The *Robertson* case held that a prize award for a symphony submitted in a music contest under an agreement by the composer giving up valuable rights in his work, constituted remuneration rather than gift. This Court specifically found the "prize" to be the "discharge of legal obligations—the payment for services rendered or consideration paid . . . in no sense a gift." 343 U.S. at 713.⁵²

⁵¹ The Government submits that the *American Dental* decision was severely limited or overruled by *Commissioner v. Jacobson*, 336 U.S. 28 (Br. 29). But this Court in *Jacobson* actually applied the "something for nothing" test laid down in *American Dental*:

"The situation in each transaction is a factual one. It turns upon whether the transaction is in fact a transfer of something for the best price available or is a transfer or release of only a part of a claim for cash and of the balance 'for nothing.' The latter situation is more likely to arise in connection with a release of an open account for rent or for interest as was found to have occurred in *Helvering v. American Dental Co.*, *supra*, than in the sale of outstanding securities . . . as presented in this case." 336 U.S. at 51.

The Eighth Circuit has followed *American Dental* on analogous facts after the *Jacobson* decision in *Reynolds v. Boos*, 188 F. 2d 322 (8th Cir. 1951). Recognizing the continuing vitality of *American Dental*, the District Court in that case observed: "Nothing said by the Supreme Court in *Commissioner of Internal Revenue v. Jacobson*, 1949, 336 U.S. 28, 69 S. Ct. 358, wherein the question of gifts was again before the court, may be taken to indicate disapproval of the decision in the *American Dental Co.* case." 84 F. Supp. 185, 189 (D.C. Minn. 1949).

⁵² The Government quotes a statement from the *Robertson* opinion for its argument that charitable impulse is a necessary ingredient of gift under the Code (Gov. Br. p. 28): "The case would be different if an award were made in recognition of past achievements or present abilities, or if payments were given not for services . . . but out of affection, respect, admiration, charity or like impulses." 343 U.S. at 713-714. But this language, by juxtaposing services on the one hand with donor motivation on the other, merely makes clear the Court's intention to reaffirm the *American Dental* gratuity test of gift as "something for nothing."

Finally, in *Commissioner v. Lo Bue*, 351 U.S. 243 (1956), in finding that stock options offered to employees did not constitute gifts under the statute, the Court once more made clear that the finding of gift hinges on determination of the objective question whether the benefit conferred is actually a gratuity or merely an alternative form of compensation for services, rather than upon any subjective test of donor motive. The Court emphasized that "the company was not giving something away for nothing" and that when "assets are transferred by an employer to an employee to secure better services they are plainly compensation" (351 U.S. at 247).

Decisions of lower courts likewise illustrate the principle that donor economic interest, even an interest permitting the business expenditure deduction, will not defeat the gift status of benefits gratuitously received. Thus in *Glenn v. Bates*, 217 F. 2d 535, the Sixth Circuit held that when a dealer advertised that a new automobile would be given away to one who came to his showroom on a given date, the automobile thus given away was, to the recipient, a gift. Although the donor's motivation was obviously and purely one of business interest, the Court upheld the taxpayer's claim of the gift exemption since to the recipient the car constituted a gratuity. Other advertising give-away rulings are to like effect.⁵³

The Commissioner himself has recognized that a benefit

⁵³ See e.g., *Ray W. Campeau*, 24 T.C. 370 (1955); *Pauline C. Washburn*, 5 T.C. 1333 (1945); *Hernandez v. Fahn*, 144 F. Supp. 630 (S.D. Fla. 1956); *Lawton v. United States*, 144 F. Supp. 640 (D.C. Va. 1956). In like vein in a number of cases the courts have held that payments made by employers to the widows of former employees are received as gifts by the widows. Neither "past considerations" nor the business deductibility of such payments by the employer have been found sufficient to defeat the gift status of the benefits for which the widows rendered no service or obligation. See appendix in the *Brief Amicus Curiae on Behalf of Mrs. Bernice Curry Myers* in this case.

conferred by a donor from economic self-interest may still be received by the donee as a gift. For instance, the Commissioner ruled only last year that employer distributions of turkeys, hams and similar items to employees at Christmas time constituted gifts to the employees although their cost was deductible as business expense by the employer. Rev. Rul. 59-58, C.B. 1959-1, 17. Similarly, the Commissioner has agreed to follow numerous court decisions that payments to widows of deceased employees are gifts though deductible by the corporation as business expenditures. Rev. Rul. 58-613, C.B. 1958-2, 914. Economic motive is often strongly present in a gift of property from father to son—to reduce income and estate taxes—but the transaction is still a gift. Corporations support local community chests, the Red Cross and the like to promote their public relations programs and yet these business expenditures are deductible as charitable gifts.

Examples could be multiplied but there is no need, for it is eminently clear that the decisions of this Court, the numerous holdings of lower courts, and the rulings of the Commissioner himself demonstrate that gratuity rather than donor motivation constitutes the test of gift under the Code.

(ii) It should be noted that the Government's "donor motivation" test of gift not only fails to find support in previous decisions but would also create unwarranted burdens in the enforcement of the gift exemption. The Government has made much of the need for a "uniform rule" concerning the tax status of strike relief benefits. Yet the Government's substitution of the subjective "donor motivation" test of gift for the current objective "gratuity" test would make for precisely the kind of case-by-case, jury-by-jury, problems the Government professes a desire to avoid. If, as the Government would have it, donor motiva-

tion provides the test of gift, how could the Commissioner properly render a general ruling on strike benefits which, under the Government's view, are allowed or denied the gift exemption in the light of the particular donor's particular motivation? The Government's proffered test of gift would, if accepted, create piecemeal litigation burdens in the determination of subjective donor motivation.⁵⁴

To reject the donor motivation test is not, of course, to deny the Government fair opportunity to collect tax on payments which are in fact compensation, whether or not denominated by the donor as a gift. Within employer-employee and similar commercial relationships the ordinary inference is that benefits conferred are part of the *quid pro quo* of the relationship. Some courts have gone so far as to say that in employment situations there is a presumption that bonuses, honorariums and similarly denominated "gifts" are in fact part of the ordinary compensation contemplated by the relationship of the parties.⁵⁵ Thus to adhere to the present rule that a gratuity constitutes a gift is not to deny the Government fair opportunity to tax commercial transactions which, however denominated, are in fact compensation. The burden remains upon the taxpayer to demonstrate "gift", and the closer and more continuous the commercial relationship between donor and

⁵⁴ We cannot refrain from noting the inherent illogic of the Government's attempt to resolve the taxpayer's right to claim the gift exemption not upon the basis of the status of the recipient taxpayer but rather upon the basis of the motives of a third party—the donor. Nothing in the legislative history of the gift exemption implies that Congress meant to impose upon the taxpayer claiming the benefit of the exemption so difficult and elusive a burden of proof as the Government's donor motivation test would create.

⁵⁵ See e.g., *Neville v. Brodrick*, 235 F. 2d 263 (10th Cir. 1956); *Wallace v. Commissioner*, 219 F. 2d 855 (5th Cir. 1955); *Carragan v. Commissioner*, 197 F. 2d 246 (2d Cir. 1952); *Wilkie v. Commissioner*, 127 F. 2d 953 (6th Cir. 1942), cert. denied, 317 U.S. 650.

donee, the more onerous is the taxpayer's burden of proof.

In its brief in *Commissioner v. Duberstein*, No. 376, the Government makes much of that taxpayer burden, suggesting in effect that in the commercial relationship involved in that case what was denominated as gift was but a covert form of compensation. No doubt a similar contention will be made in *Stanton v. Commissioner*, No. 546. In our view the record in both *Duberstein* and *Stanton* fails to bear out the Government's attack upon the gift status of the transactions there involved.⁵⁶ In any event, this Court need not adopt erroneous principle to achieve correct result, and it is clear that even in the commercial and employment cases the objective gratuity test of gift provides the Government with fair opportunity to impose tax upon what is in fact not gift but compensation.

The Government's unhappiness with the objective gratuity test of gift is, of course, an unhappiness created by this Court's decision in *Bogardus*, followed in *American Dental* and subsequent cases. But in the more than twenty years since *Bogardus* was decided, there has been no indication of Congressional concern that this Court's gratuity test of

⁵⁶ The Government is concerned about the *Duberstein* and *Stanton* cases "because their primary importance 'lies in the tax treatment of payments made by business entities, and particularly . . . by corporations.'" The Government is concerned that "a payment may be both a gift nontaxable to the recipient and a business expense deductible by the payor" (Petition for Certiorari in *Duberstein*, pp. 10-11). The Government further points out that the problem in these cases "cuts across the whole field of business gifts to individuals, e.g., severance pay, pensions, widow bonuses, employee bonuses, tips, Christmas gifts to buyers, finder's fees, reference fees to lawyers, kickbacks, etc.," in which the "payments are frequently large." *Id.* at 19.

Strike relief can hardly be deemed to fall within the field of corporate and business transactions of the sort which concern the Government. However, it seems to us that not only does the present gratuity test fully meet the Government's income tax needs even in these business areas, but that the very breadth of the field in which the gratuity test has its application counsels against its replacement by a far more difficult subjective donor motivation test.

gift is denying the Government opportunity to tax transactions which are in fact compensation. We submit that coming so late in the day, the Government's request for a reformulation of the ground rules concerning the measure of gift under the Code is more appropriately addressed to the Congress than to this Court.

(iii) Nor would it avail the Government anything if, contrary to the demonstration just made, the donor's economic motive or lack of charitable intention should be held to negate the gift exemption; for in this case it is clear that concern for needy workers rather than expectation of business benefit to the union underlay the International Union's distribution of strike relief.

The Government recognizes, of course, that strike relief given only to needy persons meets the *prima facie* indicia of a gift. But it seeks to overcome this *prima facie* case by a tortuous distillation of economic return benefit to the union from the granting of strike relief. The Government works out its theory like this: the bulk of the strike relief funds was made available by the International Union, the strike was requested by the International Union, the continuation of the strike benefited the International Union, the strike relief facilitated continuation of the strike—ergo, the strike relief could not be a gift because it was made with expectation of return benefit to the donor (Gov. Br. 24-25).

The Government's chain of reasoning breaks at every significant point: The International Union did not request the strike; the strike was not called or continued for the benefit of the International Union; strike relief did not facilitate the continuance of the strike; and in any event, the relief simply was not given by the International in expectation of any return economic advantage. As we earlier demonstrated (*supra*, p. 3), the strike was neither

called at the request of nor for the benefit of the International Union which supplied the strike relief. The strike was called by a secret ballot of the members of the Local at Kohler for their own benefit. The primary link in the Government's "self-interest" argument thus breaks at the outset.

Nor has there been any showing that strike relief facilitated the continuance of the strike. Actually, in most strikes today, the plant is completely closed for the duration of the strike and the benefit to the union of particular workers remaining on strike is therefore highly conjectural since those who are in need of assistance cannot return to work in any event. And even at Kohler, where some strikers did return to work, there is not a scintilla of evidence that any worker ever considered the factor of strike relief in determining whether to return to work. It is difficult to believe that persons in respondent's situation went or remained on strike because of the availability of bare subsistence food and rent benefits, when their wages at the plant would have been some \$100 a week.

On this record it is clear that the International Union did not request the strike, that the strike was not called or continued for its benefit, and that the relief conferred did not demonstrably facilitate the strike's continuance. Even assuming, however, that the relief worked to the economic advantage of the International Union which was providing the bulk of the relief funds, nevertheless it seems clear that such highly conjectural return advantage was merely an incidental byproduct, not the actual purpose of the International's strike relief distribution. Need and need alone was the measure of and the reason for the relief benefits conferred. Even were the Government correct in its contention, which we contest, that donor self-interest alone will defeat the gift status to the recipient of benefits

gratuitously bestowed upon him, strike relief is not a covert form of furthering the business interests of the International but precisely what it purports to be—subsistence relief to needy strikers and their families, bestowed out of charitable considerations.

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The factual issues concerning the alleged return "consideration" furnished by recipients of strike relief and the supposed union self-interest in making strike relief distributions—the two contentions upon which the Government rests its gift arguments—do not come to this Court for a trial *de novo*. Yet the assumptions of fact in the Government's brief are marked by an obvious absence of Record references, for the Government's arguments are not based on the evidence but on its self-serving and *ipse dixit* characterization of union strike relief distributions. Under these circumstances it is hardly surprising that the court below agreed with the jury's special finding which flatly contradicts every one of the Government's assumptions about strike relief. Thus, whereas the jury made a special finding of "gift" after an instruction that "gift" would be defeated "if these payments were made by the Union because of any obligation, either legal or moral . . ." (R. 42), the Government nevertheless urges that the benefits were conferred because of a "contractual obligation" (Gov. Br. 17-18, 33-34). Similarly, whereas the jury found "gift" after an instruction that the term "denotes the receipt of financial advantage gratuitously," and "without the payment being made as remuneration for something that the Union wished done or omitted . . ." (R. 43), the Government argues that the strike relief was given not gratuitously, but rather with the expectation of return benefit to the union (Gov. Br. 19, 24-25). And finally, whereas the jury

was repeatedly instructed that a "gift" requires the bestowing of value "only because of personal regard or pity or from general motives of philanthropy or charity . . ." (R. 42-43), the Government continues to urge the absence of such-motivating factors in the distribution of subsistence relief to needy strikers.

Not only are the Government's gift contentions premised on propositions of law which are demonstrably erroneous but they necessarily rest upon assumptions of fact concerning the distribution of strike relief which fly in the face of the record and of a special finding by the jury rendered upon instructions of which the Government does not and could not complain under its donor motivation theory. In these circumstances it is submitted that nothing warrants the reversal of the ruling below that the strike relief received by respondent is freed from tax by the statutory gift exemption.

Conclusion

Measured against the established tests and precedents on "income" and "gift", strike benefits clearly do not constitute receipts subject to income tax. Apparently the Government itself recognizes the strength of the ruling to that effect by the court below for it finds itself forced to fall back upon an "equivalence" argument grounded on supposed policy considerations rather than on established tax law (Gov. Br., pp. 44-46). It urges that strike relief should be subject to tax because otherwise some portion of wages earned, which are deducted by employees as a union dues "business expense", are also ultimately distributable as nontaxable strike relief.

The theory of tax equivalence which the Government here puts forward has not met with judicial favor. Thus in *American Dental*, 318 U.S. at 322, this Court held a release of indebtedness to be a tax free gift to the debtor although the indebtedness had earlier been used by the debtor as a tax deduction. As the Eighth Circuit stated in another release of indebtedness case, *Reynolds v. Boos*, 188 F. 2d 322, 325-326, in response to the equivalence argument, "there is no such general or blanket principle of tax liability." Indeed, the Commissioner himself does not adhere to the policy of tax equivalence which is here urged upon the Court.⁵⁷ Moreover, in the present context the Commissioner's equivalence argument is entirely inappropriate to the case before the Court, for respondent never deducted any union dues as a business expenditure because he had paid no dues.

But the final answer to the Government's proffered equivalence policy is found in the existence of a far more

⁵⁷ Employer premiums on employee group life insurance are not includible in the employees' income though they are deductible by the employer. L.O. 1014, C.B. 2, 88 (1920); Income Tax Regulations, Section 1.61-2(d)(2). And see *supra*, p. 51.

compelling policy *against* the taxation of strike benefits. That policy—which certainly underlies the rulings holding nontaxable retirement, unemployment, Red Cross, public assistance and similar benefits—is the compelling consideration that subsistence relief afforded to the destitute and needy, what has sometime been described as the “poor box”, is hardly a proper source of federal revenue. It is a shocking suggestion indeed, one contrary to the most fundamental public policy, that subsistence food and rent to strike-bound workers and their families should be devalued by imposition of a federal tax burden.

It is thus clear that the ruling below is as correct a resolution of competing policy considerations as of decisional law. It is therefore respectfully submitted that the decision below should be affirmed.

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APPENDIX A**TREASURY DEPARTMENT**

Washington 25

Office of
Commissioner of Internal Revenue

GC:I:JAG:DEM
A-404603

February 13, 1946.

Mr. Leon Henderson
1420 New York Avenue, N.W.
Washington, D. C.

MY DEAR MR. HENDERSON:

Your letter to Honorable Fred M. Vinson, Secretary of the Treasury, dated January 28, 1946, has been forwarded to this office for reply. You request a ruling that contributions to The National Committee to Aid Families of General Motors Strikers, Inc., constitute allowable deductions by the individual donors under section 23(o) of the Internal Revenue Code.

It appears from information contained in your letter and in a supplemental statement filed with the Bureau on February 7, 1945, by Joseph Rauh, Vice Chairman of the Washington Committee, that The National Committee to Aid Families of General Motors Strikers, Inc., was incorporated on January 21, 1946, under the laws of the State of New York, for the following purposes:

"To come to the voluntary aid of destitute and needy persons, to help them financially and to rehabilitate themselves either directly or in cooperation with other relief and charitable agencies, and particularly to voluntarily aid the families of striking employees of the General Motors Corporations or other organizations who are in destitute and needy circumstances.

"To exercise all the rights and powers provided for by the Membership Corporations Law of the State of New York."

It is stated that the Committee was organized by persons having no connection with the union involved in the strike, and that, in carrying out its purposes, the Committee operates independently of any labor union.

The class of persons to receive assistance will be those persons within the group who are selected by the representatives of the Committee on the basis of actual need and lack of other means of help. The Committee also plans to render assistance to needy families after the strike is settled and before the first wages are received, a period estimated to be about three weeks.

It is stated that the Committee takes no position on the issues in controversy or on the merits of the strike. In its solicitation of funds, it appears that the Committee stresses that its purpose is solely to help families who are in actual need. It is stated that the funds collected will be used to purchase food and other necessities of life for distribution to such needy families or will be distributed among those families for such purposes. It appears that distribution is made through local committees of the National Committee formed in the communities principally affected by the General Motors strike. The local committees are composed of recognized social workers and religious leaders of all faiths in those communities, and those committees pass on the urgency of the cases. It is stated that, due to the large number of persons involved and the insufficiency of funds, only the neediest cases will be given help.

Section 23(o) of the Internal Revenue Code provides that in computing net income there shall be allowed as deductions, in the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

* * * * *

(2) a corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scien-

tific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

.

limited to an amount which does not exceed 15 percent of the taxpayer's adjusted gross income.

Careful consideration has been given to the information submitted as to the purpose and activities of The National Committee to Aid Families of General Motors Strikers, Inc. Based solely on the foregoing representations made by officers of your organization, if your organization carries on operations in accordance with the provisions of its charter and in accordance with the above representations, it will be considered to be a corporation organized and operated exclusively for charitable purposes, and contributions by individuals to the Committee will be deductible in the manner and to the extent provided in section 23(c) of the Internal Revenue Code.

Very truly yours,

/s/ JOSEPH D. NUNAN,
Commissioner.

(9337-7)

Office of the Clerk, U.S. Supreme Court
7 2 2 2 3 3
JAMES F. ROBERTSON, Clerk

No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

P.
ALLEN KAISER

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,

*Solicitor General,
Department of Justice, Washington 25, D.C.*

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 55

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN KAISER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

STRIKE BENEFITS ARE NOT GIFTS

1. With respondent's assertion that "the issue of strike relief is too special and atypical" to afford a suitable vehicle for a broad examination of the meaning of "gift" (Br. 14) we agree, and it is because we shared that view that we asked the Court to hear at the same time two other cases placing the issue in its more usual context, *Commissioner v. Duberstein*, No. 376, and, more particularly, *Stanton v. United States*, No. 546. It does not follow, however, that the "gift" issue here can be disposed of, as respondent suggests, without touching upon the fundamental questions which the three cases present in common.

Respondent's suggestion of how the basic issue might be avoided—by affirming the jury's verdict on "unassailed" instructions (Br. 14-16)—does not in any event avoid the issue, but rather resolves it in what we believe is the least desirable way of all the alternatives: by saying that a "gift" is a "gift" and that the characterization of a payment is, without further specification, a question of fact for the jury. It is true that we did not expressly "assail" the instructions in our main brief. The reason, however, is that it is scarcely profitable to examine the adequacy of instructions to present a question of fact until it is first decided what the question of fact is. And, as we show in our brief, if the definitional problem is first resolved, as it must be, it becomes clear that there was no disputed issue of fact to be submitted to the jury.

So that there may be no misunderstanding of our position, however, we note that even if the Court should conclude that there was a question of fact to be submitted to the jury, the instructions here were inadequate. The reason is that the instructions were self-contradictory. They consisted of paraphrases from leading decisions in the field and were necessarily no more consistent than the decisions.¹ A few examples will suffice (R. 41-43): The jury was in-

¹ See R. 51-52 and accompanying footnotes (R. 54-55, notes 7-14). *Helvering v. American Dental Co.*, 318 U.S. 322; *Bogardus v. Commissioner*, 302 U.S. 34; and *Base v. Hawley*, 62 F. 2d 721 (C.A. 5), seem to have been the primary sources. For the consistency of *American Dental* with *Bogardus* and the later decisions of this Court, see our brief in *Stanton*, pp. 65-

structed, on the one hand, that "the absence or presence of consideration, in the legal sense" or the fact that the payment was "voluntary" was not controlling but, on the other, that the question was "were the payments gratuitous? Were they intended to be gratuitous, without either legal or moral obligation to make the payments and without expecting anything in return?" It was told that "the intention with which the payments, however voluntary, were made" was controlling, but that if they "were made as compensation for services, even though the Union did not consciously have that intent," they were taxable. The payment was not a gift unless "bestowed only because of personal regard or pity or from general motives of philanthropy or charity,"² but, on the other hand, the "fact that the motives leading to the payment may have been grounded on business reasons, or even selfishness, is not controlling." A gift was "the receipt of financial advantage gratuitously, without obligation to make the payment, either legal or moral," but the payment, however voluntary, was income if it was the "intention" of the union to "pay for" services. Even with omniscient insight into every aspect of the transaction, the question put by those instructions could not, we submit, be answered, and from the jury's an-

² The source of that phrase is *Bass v. Hawley*, *supra*, an excellent opinion by Judge Sibley that seems clearly to reject "intention" as controlling and to define as a gift only that which is prompted by "personal" motivations. *Bass* and *American Dental* are the polar extremes of the concept of a gift, yet the jury was given both definitions without attempted reconciliation.

swer it is, by the same token, impossible to tell what "fact", if any, was found.

Respondent asserts that the questions posed by the facts of this case cannot be one of law because the facts of other cases may be different (Br. 17-19). However, all rules of law turn on facts and allow for different results on different facts, and in each case the determination whether there is a question of fact for the jury must come after, not before, the relevant facts have been defined by a rule of law.

2. Turning to the question of law, respondent would apparently define "gifts" as any "gratuity," meaning by that any payment made without obligation and not for a bargained-for exchange (Br. 47). Although that definition seems indeed to be supported, as respondent claims (Br. 48-50), by *American Dental* and the advertising give-away cases, those cases, as we point out in our *Stanton* brief (pp. 25-26, 65-67), are inconsistent with the great bulk of the "gift" cases both of this Court and the lower courts and can be more satisfactorily explained in their pre-*Glenshaw* context as having held that "windfalls" are not income. In those cases, moreover, there was no causal relationship at all between anything done by the recipient and the receipt of the payment. Here there admittedly is a causal relationship between striking and receipt of strike benefits, and the question is whether it is close enough to justify treating the one as being "for" the other.

In the end, respondent himself seems to acknowledge that his "objective gratuity test" (Br. 53) is no test at all, by conceding that a "gratuity" is not a

gift if it is "in fact" compensation (Br. 52-54). That of course is the very distinction that it is the function of a definition to make; and a definition, in effect, that a property-law gift is a "gift" for tax purposes unless it "really" is not a gift does not advance the inquiry. What is needed is a test to determine when a gratuitous payment is "in fact" a gift and when it is "in fact" not a gift.

3. Accepting *arguendo* our contention that the controlling question on the "gift" aspect of the case is motive²—why did the union make the payments?—re-

² Respondent cites Rev. Rul. 59-58, 1959-1 Cum. Bull. 17, and Rev. Rul. 58-613, 1958-2 Cum. Bull. 913, as evidence that the Commissioner does not consider the presence of a business reason for a payment as precluding a gift (Br. 51). Rev. Rul. 59-58 stated that the value of turkeys, hams, or similar merchandise given by an employer to employees at Christmas or some other appropriate holiday need not be reported as income. The ruling does not, as respondent claims, hold that such items are "gifts" but rather that they are not "income." The ruling is a recognition that it is neither feasible as an administrative matter nor a reasonable burden to impose on taxpayers to require every non-monetary receipt, however nominal, to be accounted for. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, although putting an end to metaphysical disputes over the "nature" and "sources" of income, did not, we believe, preclude such a recognition of the practical necessity of limiting the reach of § 61(a) to "significant" transactions and not overburdening the tax system with accounting for *de minimis* receipts of benefits in kind, such as free coffee and doughnuts to employees, discount privileges, being taken to lunch or dinner by one's employer or associates, etc.

Rev. Rul. 58-613 (which incorporated the information release stated at p. 107 of our *Stanton* brief) does not, as respondent implies, reflect the Commissioner's agreement with the widow-bonus cases. Rather, the Service, having lost 30-odd such cases, simply concluded it was fruitless under the present state of the law to continue to litigate such cases.

spondent reiterates in several different ways the conceded fact that the benefits are conditioned on need (Br. 39-40, 45-46, 54-56) and asks the Court to conclude from that fact alone that the benefits were "bestowed out of charitable considerations" (Br. 56). Respondent does not deny that there is some relationship between participation in an authorized strike and receipt of the benefits but makes no attempt to explain that relationship or to reconcile it with the "charitable" explanation of the union's action. The failure to meet the question of "Why?" is evident in respondent's refusal even to identify who the donor was who was moved by "charity". The "charitable" impulses of the union officers, if any, are patently irrelevant, for it was not their money, but the union's, that was expended, and that could be used only for purposes authorized by the constitution—as of course it clearly was. The answer to the question "Why were the payments made?" thus necessarily turns on the answer to the question "Why did the members of the union, in adopting the constitution, mutually agree to contribute 25 cents a month to a fund to be used to pay strike benefits in any union-approved strike?"⁴ How that agreement can be explained

⁴ Our contention that strike benefits are paid pursuant to a contractual obligation, it may be noted, is based primarily on the agreement to contribute 25 cents to a fund to be used "exclusively" for that purpose (Art. 16, § 11; Br. for U.S., pp. 4-5) and not, as respondent would have it (Br. 42), on the "general declaration of policy" that the union will render financial assistance to the extent financially able (Art. 12, § 15; Br. for U.S., p. 4). Respondent's argument that the payments cannot be pursuant to a contractual obligation because there is no assurance that the benefits received by each member will equal

as a manifestation of "charitable" motives—unless we accept the dictum that charity begins at home—respondent does not attempt to, and cannot, answer.

II

STRIKE BENEFITS ARE INCOME

In this Court, respondent seems to place his greatest reliance on the claim that strike benefits, even if not within the gift exclusion, are nevertheless outside the scope of the definition of "income" in § 61(a), and we agree that that is the controlling issue in this case.

1. The very purpose, and salutary effect, of the opinion in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, was, we believe, finally to put an end to the sort of inquiry into the "nature" of a receipt that respondent now urges upon the Court. By there giving to the all-inclusive statutory definition of income its full sweep, subject only to the exclusions expressly provided, the Court placed the responsibility for the kind of policy judgment implicit in respondent's argument squarely where it belongs—upon Congress. And in terms of what respondent chooses to call "alleviative" receipts—those necessary to subsistence—Congress has made such a judgment by the system of personal exemptions allowed taxpayers. Recognizing that some minimum of income was necessary to sub-his contribution (Br. 44-46) is a *non sequitur*. If benefits were to be realized in direct proportion to dues paid, the strike fund would serve no function. The fund provides, as it were, insurance protection for all; the reciprocity lies in the equal *prospects* each has of being the ultimate recipient, not in the assurance that each will recover the exact amount of his contribution.

sistence, Congress exempted from taxation the first \$600 of income and an additional \$600 for each dependent. Whether as a matter of policy some greater exemption should be allowed taxpayers part of whose receipts are in the form of strike benefits is, we believe, equally a question for Congress.

2. Respondent seeks to avoid the impact of the rationale of *Glenshaw* that all realized "gains" are income unless expressly excepted by contending that strike benefits do not represent a "gain" to the recipient. Clearly, however, there is no "loss," personal or economic, against which the receipt may be cancelled out—as there is in the case of disaster relief or compensation for injuries to personality (see our main brief, pp. 41-42)—and if the concept of "gain" is to have any objective meaning, rather than being simply a new word under which to resurrect the pre-*Glenshaw* controversies over the nature of taxable income, such a receipt must surely qualify as a "gain." The new principle asserted by respondent that "alleviative" receipts are not "gain" cannot withstand analysis. All income alleviates needs to one degree or another, and strike benefits do so to no greater degree than wages in the same amount. The "alleviative" principle can be logically applied only in the way that Congress has applied it—by a policy judgment of the amount of income that a taxpayer should be allowed before being called upon to share the financial burdens of government.

3. Respondent's "doctrine of equal treatment" (Br. 19-26) cuts both ways. The object of a fair tax system, as respondent notes (Br. 19, n. 6), is "that

equal income should bear equal tax liabilities." Another taxpayer similarly situated to respondent who, by working full-time at a lower-paying position, had an adjusted gross income of \$3,235.02 (R. 13) would admittedly have to pay the full tax asserted against respondent. The question is whether, because \$565.54 of the respondent's receipts were in the form of strike benefits, he should be entitled to pay \$108 less tax than such a taxpayer.

The point is that, while we agree with respondent that things equal should be treated equally, it hardly helps in answering the question here. Public payments, as we note in our main brief (pp. 35-36), are fundamentally different in the very fact that they are *public* and made for *public* purposes, and are not, like strike benefits, paid in furtherance of private economic objectives. While strike benefits are also unlike ordinary wages in some respects, the question to be resolved is which distinction is the significant one.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MARCH 1960.

SUPREME COURT OF THE UNITED STATES

No. 55.—OCTOBER TERM, 1959.

United States, Petitioner,
v.
Allen Kaiser.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Seventh Cir-
cuit.

[June 13, 1960.]

MR. JUSTICE BRENNAN announced the judgment of the Court, and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS join.

This case presents the questions whether a labor union's strike assistance, by way of room rent and food vouchers, furnished to a worker participating in a strike constitutes income to him under § 61 (a) of the Internal Revenue Code of 1954;¹ and whether the assistance furnished to this particular worker, who was in need, constituted a

¹ "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including, (but not limited to) the following items:

"(1) Compensation for services, including fees, commissions, and similar items;

"(2) Gross income derived from business;

"(3) Gains derived from dealings in property;

"(4) Interest;

"(5) Rents;

"(6) Royalties;

"(7) Dividends;

"(8) Alimony and separate maintenance payments;

"(9) Annuities;

"(10) Income from life insurance and endowment contracts;

"(11) Pensions;

"(12) Income from discharge of indebtedness;

"(13) Distributive share of partnership gross income;

"(14) Income in respect of a decedent;

"(15) Income from an interest in an estate or trust."

"gift" to him, and hence was excluded from income by § 102 (a) of the Code.²

The respondent was employed by the Kohler Company in Wisconsin. The bargaining representative at the Kohler plant was Local 833 of the United Automobile, Aircraft, and Agricultural Implement Workers of America, CIO (UAW). In April 1954, the Local, with the approval of the International Union of the UAW, called a strike against Kohler in support of various bargaining demands in connection with a proposed renewal of their recently expired collective bargaining contract. The respondent was not a member of the Union, but he went out on strike. He had been earning \$2.16 an hour at his job. This was his sole source of income, and when he struck he soon found himself in financial need. He went to the Union headquarters and requested assistance. It was the policy of the Union to grant assistance to the many Kohler strikers simply on a need basis. It made no difference whether a striker was a union member. The Union representatives questioned respondent as to his financial resources, and his dependents. He had no other job and needed assistance with respect to the essentials of life. He was single during the period in question, and the Union provided him with a food voucher for \$6 a week, redeemable in kind at a local store; the voucher was later increased to \$7.50 a week. The Union also paid his room rent, which amounted to \$9 a week. If in need, married strikers, and married strikers with children received respectively larger food vouchers.³ The over-all policy of the International Union was not to render strike assistance where strikers could obtain state unemploy-

² "Gross income does not include the value of property acquired by gift. . . ."

³ After the increase referred to, married strikers without children received a \$15 weekly food voucher; those with one child, a \$18 voucher.

ment compensation or local public assistance benefits. But the former condition does not prevail in Wisconsin,⁴ and local public assistance was available only on a showing of a destitution evidently deemed extreme by the Union.

The Union thought that strikers ought to perform picketing duty, but did not require, advise or encourage strikers who were receiving assistance to picket or perform any other activity in furtherance of the strike; but assistance ceased for strikers who obtained work. Respondent performed some picketing, though apparently no considerable amount. After receiving assistance for several months, he joined the Union. This had in no way been required of him or suggested to him in connection with the continued receipt of assistance.

The program of strike assistance was primarily financed through the strike fund of the International Union, which had been raised through crediting to it 25 cents of the \$1.25 per capita monthly assessment the International required from the local unions. The Local also had a small strike fund built up through monthly credits of 5 cents of the local members' dues, and contributions were received in some degree, not contended to be substantial, from other unions and outsiders. The constitution of the International Union required that it be the authorizing agency for strikes, and imposed on it the general duty to render financial assistance to the members on strike.⁵

⁴ Compare N. W. Labor Law, § 592 (compensation payable after seven weeks of striking).

⁵ Article 12, § provides that "The International Executive Board . . . shall have the power to authorize strikes." Section 15 of that article provides that upon such authorization, "it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union."

The strike funds referred to are provided for by §§ 4 and 11 of Art. 16 of the International's constitution.

During 1954, the Union furnished respondent assistance in the value of \$565.54. In computing his federal income tax for the year, he did not include in gross income any amount in respect of the assistance. The District Director of Internal Revenue informed respondent that the \$565.54 should have been added to his gross income and the tax due increased by \$108 accordingly. Respondent paid this amount, and after administrative rejection of a refund claim, sued for a refund in the District Court for the Eastern District of Wisconsin. A jury trial was had, and the court submitted to the jury the single interrogatory whether the assistance rendered to respondent was a gift. The jury answered in the affirmative; but the court entered judgment for the Government, n. o. v., on the basis that as a matter of law the assistance was income to the respondent, and did not fall within the statutory exclusion for gifts. 158 F. Supp. 865.

By a divided vote, the Court of Appeals for the Seventh Circuit reversed. 262 F. 2d 367. It held alternatively that the assistance was not within the concept of income of § 61 (a) of the Code, and that in any event the jury's determination that the assistance was a gift, and hence excluded from gross income by § 102 (a), had rational support in the evidence and accordingly was within its province as trier of the facts. We granted the Government's petition for certiorari, because of the importance of the issues presented. 359 U. S. 1010. Later, when the Government petitioned for certiorari in No. 376, *Commissioner v. Duberstein*, and acquiesced in the taxpayer's petition in No. 546, *Stanton v. United States*, it suggested that those cases be set down for argument with the case at bar, because they illustrated in a more general context the "gift" exclusion issues presented by this case. We agreed, and the cases were argued together. We conclude, on the basis of our opinion in the *Duberstein* case, p. —, *antè*, that the jury in this case, as finder of the

facts, acted within its competence in concluding that the assistance rendered here was a gift within § 102 (a). Accordingly, we affirm the judgment of the Court of Appeals. Therefore, we think it unnecessary to consider or express any opinion as to whether the assistance in fact constituted income to the respondent within the meaning of § 61 (a).

At trial, counsel for the Government did not make objection to any part of the District Court's charge to the jury or the "gift" exclusion. In this Court, the charge is belatedly challenged, and only as part of the Government's position that there should be formulated a new "test" for application in this area.* We have rejected that contention in our opinion in *Duberstein*. In the absence of specific objection at trial, or of demonstration of any compelling reason for dispensing with such objection, we do not here notice any defect in the charge, in the light of the controlling legal principles as we have reviewed them in *Duberstein*.

We think, also, that the proofs were adequate to support the conclusion of the jury. Our opinion in *Duberstein* stresses the basically factual nature of the inquiry as to this issue. The factual inferences to be draw from the basic facts were here for the jury. They had the power to conclude, on the record, taking into account such factors as the form and amount of the assistance and the conditions of personal need, of lack of other sources of income, compensation, or public assistance, and of dependency status, which surrounded the program under which it was rendered, that while the assistance was furnished only to strikers, it was not a recompense for striking. They could have concluded that the very general language of the Union's constitution, when considered

* Specific challenge to the instructions was not made by the Government until its reply brief in this Court, and then only on the basis we have noted.

with the nature of the Union as an entity and with the factors to which we have just referred, did not indicate that basically the assistance proceeded from any constraint of moral or legal obligation, of a nature that would preclude it from being a gift. And on all these circumstances, the jury could have concluded that assistance, rendered as it was to a class of persons in the community in economic need, proceeded primarily from generosity or charity, rather than from the incentive of anticipated economic benefit. We can hardly say that, as a matter of law, the fact that these transfers were made to one having a sympathetic interest with the giver prevents them from being a gift. This is present in many cases of the most unquestionable charity.

We need not stop to speculate as to what conclusion we would have drawn had we sat in the jury box rather than those who did. The question is one of the allocation of power to decide the question; and once we say that such conclusions could with reason be reached on the evidence, and that the District Court's instructions are not overthrown, our reviewing authority is exhausted, and we must recognize that the jury was empowered to render the verdict which it did.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 55.—OCTOBER TERM, 1959.

United States, Petitioner,

v.

Allen Kaiser.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Seventh Cir-
cuit.

[June 13, 1960.]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of my Brother BRENNAN, my view of the merits is so divergent from the rest that a word of explanation is needed. *Bogardus v. Commissioner*, 302 U. S. 34, 41, in holding payments by stockholders to employees were, on the facts there present, gifts, said:

"There is entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act."

Had a motion for a directed verdict been made by respondent at the close of the evidence, I think with all deference that it should have been granted, since my idea of a "gift" within the meaning of the Internal Revenue Act is a much broader concept than that of my Brethren. As the opinion of the Court points out, this striker (who became a union member without solicitation several months after he began receiving benefits) had no legal or moral duty to picket or to do any other act in furtherance of the strike. There is no evidence that the union made these payments to keep this striker in line. It is said that these strike payments serve the union's cause in promoting the strike. Yet the whole setting of the case indicates to

me these payments were welfare, plain and simple. Unions, like employers, may have charitable impulses and incentives. Here only the needy got the relief.* Yet since

*An administrative letter from the national union to the local unions dated March 6, 1952, states in part:

"The handling of the emergency health and welfare problems of our members and their families is one of the most important tasks facing our Union during strike periods. We should do everything possible to minimize the hardship of our members and their families during strike periods by using the resources of the community and our Union.

"The International Union, UAW-CIO, has established a Community Services Program in order to assist our members in making full use of community services. These health and welfare agencies have been organized in the community to render services, including financial assistance, medical, hospital and nursing care, legal aid, unemployment compensation (in New York State), family and child care, and other such services. These services can be used by our members during strike periods as well as in lay-off periods. Our members support and pay for such services through taxes for Federal, state and local public agencies and through contributions for voluntary community agencies.

"... Emergency strike assistance may be given to strikers who cannot meet their minimum needs with their own individual resources, who cannot qualify for such assistance from community agencies. Local Unions requiring strike assistance from the International Union must make their application for assistance to their Regional Director."

The parties stipulated to the following:

"... The International Union grants strike benefits to non-members of the Union, who participate in a strike, if they do not have sufficient income to purchase food or to meet an emergency situation. The Union treats such non-members on the same basis as members of the Union, but non-members as well as members must be strikers before they may receive assistance from the Union.

"In order to obtain strike benefits from the Union, each applicant must appear before a Union Counsellor who asks him a series of questions which are contained on a printed Counselling form.

"... The Union makes a distinction between applicants in granting strike benefits to them, depending on their marital status and num-

(so far as the present record shows) respondent acquiesced in the submission to the jury, the United States received more favored consideration than it could claim as of right.

ber of dependents. At the time the Kohler strike aid program began, a single person received a food voucher for \$6.00 per week; a married couple without dependents received a food voucher for \$10.00 a week; a married couple with two children, a food voucher for \$13.85 a week. On June 28, 1954, the Union increased the amount of aid to the people on the Kohler strike: aid for a single person was increased to \$7.50 a week; for a married couple without dependents aid was increased to \$15.00 a week; aid for a married couple with one child was increased to \$18.00 a week."

SUPREME COURT OF THE UNITED STATES

No. 55.—OCTOBER TERM, 1959.

United States, Petitioner,	} On Writ of Certiorari to the United States Court of Ap- peals for the Seventh Cir- cuit.
<i>v.</i> Allen Kaiser.	

[June 13, 1960.]

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK joins, concurring in the result.

In 1957 the Commissioner of Internal Revenue ruled that strike benefits paid by unions to strikers on the basis of need, without regard to union-membership, were to be regarded as part of the recipient's gross income for income tax purposes. Rev. Rul. 57-1, 1957-1 Cum. Bull. 15. This ruling, if valid, governs this case. The taxpayer assails the ruling on three grounds. First, it is urged that in a series of rulings since 1920 the Commissioner has treated both public and private "subsistence relief" payments as not constituting gross income; that union strike benefits are not relevantly different from such "subsistence relief"; and that, with due regard to fair tax administration the Commissioner is constrained so to treat strike benefits in order to accord "equal treatment." Second, it is urged that both the Commissioner's rulings and court decisions have evolved an exclusion from the statutory category of "gross income," not explicitly stated in the statute, for "alleviative" receipts which do not result in any "enrichment," i. e., "reparation" payments made in compensation for some loss or injury suffered by the recipient, and that strike benefits fall within this exclusion. Third, it is urged that strike benefits in general, or at least these strike benefits in particular, are to be deemed "gifts" within the meaning of the statutory exclusion from gross income of "gifts."

The taxpayer's first ground, that of the denial by the Commissioner to strike benefits of consistent treatment accorded other public and private "subsistence relief" payments, depends wholly upon past rulings of the Commissioner. In chronological order, the substance of the Commissioner's rulings deemed relevant to this ground by the taxpayer are set out in the Appendix to this opinion. Set out as well are the rulings deemed pertinent by both parties to the theory of "alleviative" "reparations" receipts. The two theories overlap and much of the material relevant to them is the same. For each ruling are included the relevant facts, the Commissioner's conclusion, with his reasons and supporting authority when given.

What these rulings reveal largely depends on the viewpoint from which their meaning is read. Only two of the rulings set out in the Appendix, Numbers 1 and 21, dealt expressly with strike benefits, and Number 21 is the 1957 ruling here challenged. Putting this 1957 ruling aside, the conclusion may be drawn from these rulings that the Commissioner has not taxed receipts for which no services were rendered and no direct consideration was given, which did not arise out of an employment relation, and which were relatively small in amount and designed to enable the recipient to provide for his needs so they can be said to have been in a sense "subsistence" payments. None of the rulings holding payments taxable squarely contradicts such a conclusion.

Number 2, taxing union unemployment benefits, does not because the benefits there were paid by the union only to its members, and it can be supposed that members paid dues and lent their support in other ways, and thus there was consideration for the benefits.

Numbers 5, 15, 19, 24 and 25, all holding "subsistence" payments taxable, do not contradict it. The

payments in those cases were either made from funds partly or wholly sustained by the employer (Numbers 5 and 19), or the recipient had become eligible for benefits by paying into the fund from which the payments were made (Numbers 15, 24, and 25). Thus, it can be said that there was consideration for the payments, as there is for example consideration for insurance. In Numbers 24 and 25 it is in fact clear that the benefits paid varied with the recipient's contribution to the fund, and in Number 15 the fact is not stated one way or the other.

Number 1, the first strike-benefit ruling, does not squarely contradict a conclusion regarding "subsistence relief" payments made without consideration, because that also only concerned payments to union members.

Only Number 20 casts doubt on the conclusion, but not enough seriously to disturb it. In that ruling, concerning payments by the German Government to persons mistreated by the Nazis, it was left open that some payments, greater than the basis in the property confiscated by the Nazis, might be taxed as income, depending on the circumstances. But it can be reasoned that such payments were windfalls, not related to "subsistence," and in any event it was not clearly decided that they were income.

So, if one starts with a feeling or assumption that "subsistence relief," paid without the voluntary giving of consideration, has not been taxed by the Commissioner, material may be adduced to justify one's starting point.

There are two reasons why such reasoning does not conclude this case in my view. First, it is far from clear that, as a matter of law, the situation before us falls within a hypothetical "subsistence relief" category. Although the taxpayer paid no union dues before or during the taxable year, he did picket, and for part of the year he was a

member of the union. The Commissioner has regularly taxed "subsistence" payments by unions to union members as well as payments made from a fund to which the recipient contributed, or to which his employer contributed. See Numbers 1, 2, 15, 19, 24 and 25. Although it may be possible to distinguish all these rulings on the ground that here taxpayer's contribution to the union was minimal and that the strike benefits were in fact paid to members and non-members alike, they hardly furnish solid basis for a claim of uniform treatment of non-taxability by the Commissioner of payments like the strike benefits in this case.

My second objection is more basic. A fair evaluation of the administrative materials in the Appendix does not lead to the conclusion that the Commissioner has uniformly treated so-called "subsistence relief" as a relevant category of payments, and one not subject to tax. The only reason urged in this case for holding the Commissioner bound to follow rulings of non-taxability which he considers inapplicable is respect for an overriding principle of "equal" tax treatment. The Commissioner cannot tax one and not tax another without some rational basis for the difference. And so, assuming the correctness of the principle of "equality," it can be an independent ground of decision that the Commissioner has been inconsistent, without much concern for whether we should hold as an original matter that the position the Commissioner now seeks to sustain is wrong.

▲ If I am right about the justification for asking this Court in this case to bind the Commissioner to former relevant rulings, with indifference to the correctness of his present position as an independent matter, the appropriate inquiry is not, "Can such and such a principle be drawn from the administrative rulings?" The right question is, "Is there any rational basis for the prior rulings which does not apply to the present case?" For only if there

is no such rational basis can the Commissioner be said to be denying "equal" treatment. Accordingly, I think that the rulings in which the Commissioner has not imposed a tax must be analyzed to ascertain whether the only principle which can explain them is a principle that "subsistence relief" is not taxable, or whether they can be reasonably explained, individually or severally, as the result of the application of some other principle or principles which do not govern the present strike benefits. I think the Commissioner's prior rulings of non-taxability can all be explained in a way which leaves the Commissioner free to assert that the strike benefits in this case are, unless "gifts," part of gross income, without denying "equal" treatment.

There are sixteen rulings set forth in the Appendix in which no tax was imposed: Numbers 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20 and 22. Of these, reasons were clearly given in several, and in several others reasons were suggested though not spelled out. In no case was the reason given that the payment was "subsistence relief" and not taxable on that score. The nature of the payment as "subsistence" was mentioned only once, in Number 12, and it was used there as a characterization, not a reason, in a ruling which expressly accepted the nature of the payments as "gifts." The reasons which have been given suggest two other grounds upon which the Commissioner has excluded many of these payments from tax.

In Number 13, one reason for the ruling was stated to be that the payments "are considered gratuitous and spontaneous." In light of the circumstances of that case, involving disaster relief, it is natural to suppose that this language reflects an application of the principle that "gifts" are not part of gross income. See also Number 21, explaining Number 13.

In Numbers 3, 4, 6, 7, 14, 16, 20, and with regard to part of Number 12, the reasons given or suggested were that the payment involved was to be treated as compensation for a loss or injury that had been suffered, and that it was not taxable either because not greater in amount than the loss or because the thing lost or damaged had no ascertainable market value and so it could not be said that there had been any net profit to the taxpayer through the effectual exchange of the thing lost for the payment received. Although not articulated there, such reasons may well have applied also in Number 13, whose express ground was one of "gift."

The fact that a companion question or even the principle question in some of these cases (see Numbers 12 and 20) was whether the payment should reduce the amount of the deduction permitted by the Code for a casualty loss, emphasizes the explicit treatment of the payments as in return for a loss suffered.

Even in those cases where the thing lost or injured had no basis to the taxpayer for purposes of computing gain or loss, the language of reparation or compensation for loss was used. Thus in Number 3 damages for alienation of affections or defamation were treated as "in compromise" "for an invasion of" a "personal right." See also 9 B. T. A. 1340, referred to in Number 7. In Number 4 damages for breach of promise to marry were held not taxable because "[a] promise to marry is a personal right not susceptible of any appraisal in relation to market values." Numbers 6 and 14 involved death payments, and they were called "compensation for [the] loss [of life]." In Number 16 the payment to a mistreated prisoner of war was called "reimbursement."

The principle at work here is that payment which compensates for a loss of something which would not itself have been an item of gross income is not a taxable payment. The principle is clearest when applied to compensation for the loss of what is ordinarily thought of as a capital asset, *e. g.*, insurance on a house which is destroyed. See Number 12. If a capital asset is sold for no more than its basis there is no taxable gain. The result, then, is the same if it is destroyed and there is paid in compensation no more than its basis. There are to be sure difficulties, not present where ordinary assets are involved, in applying this principle to compensation for the loss of something which has no basis and which is not ordinarily thought of as a capital asset, such as health or life or affection or reputation. With those difficulties we have no concern. The relevant question is whether the Commissioner has, or reasonably could have, applied a principle of reparation to deal with these cases, and the reasons given by him in Numbers 3, 4, 6, 7, 12, 14, 16, and 20 show that he has.

It is important to note that in *Commissioner v. Glenshaw Glass Co.*, 348 U. S. 426, 432, n. 8, we recognized just such treatment as "[t]he long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital," and distinguished those rulings from the case of punitive damages, which we held not to be compensatory and therefore taxable. See also *United States v. Supplee-Biddle Hardware Co.*, 265 U. S. 189, 195.

The rationale of payments in compensation for a loss is not applicable to the present case. Even if we suppose that strike benefits are made to compensate in a sense for the loss of wages, the principle of payments in compensation does not apply because the thing compensated for, the wages, had they been received, would have been included in gross income. See *United States v. Safety*

Car Heating & Lighting Co., 297 U. S. 88. That is not so in any of the rulings set out, where the thing lost and compensated for was not an item of taxable income, but an aspect of capital or analogous to capital, which obviously would not have been included in gross income had it been retained.

Taking stock, then, ten rulings of non-taxability are clearly explainable according to the two legitimate principles of "gift" and "compensation for loss" and should not bind the Commissioner to a principle that "subsistence relief" is not to be taxed. They are Numbers 3, 4, 6, 7, 13, 14, 15, 16, 20, and part of 12. The remaining portion of Number 12 concerns Red Cross disaster relief in the form of food and clothing. A ruling regarding inclusion in gross income was not asked for in that case, which concerned the use of the casualty loss deduction with regard to payments for the loss of capital assets. The relief was referred to as a "gift" in the ruling, and it was simply asserted, without explication, that, as to the food and clothing, "nor do they represent taxable income." It is not unreasonable to attribute this conclusion to an application of the principle of "gift," in light of the nature of the Red Cross as a charitable organization.

The rulings imposing no tax which thus remain unexplained as either dealing with "gifts" or payments in compensation for loss are Numbers 8, 9, 10, 11, 17, 18, and 22.

Numbers 8, 9 and 11 dealt with federal old age and death payments under the Social Security Act.

Numbers 10 and 17 dealt with unemployment payments under the Social Security Act. In Number 10 the payments were made by the States from the Federal Unemployment Trust Fund set up under that Act, and in Number 17 the payments were under the Social Security plan to cover federal employees.

Number 18 dealt with payments by the Government of Panama under an Act "basically similar" to the United States Social Security Act.

Number 22 dealt with a state payment to the blind, under a statute authorizing disbursement of money received from the United States for such a purpose.

Except for Number 22, all these payments came out of United States Social Security funds, or in the case of Number 18, a Panamanian analogue. The Commissioner has expressly treated these Social Security payments as related to each other. Number 9 relies on ruling Number 8, Number 17 relies on Number 10, and Number 18 on Number 11. These Social Security rulings rely on no others, and no others rely on them. On the other hand, the Commissioner has uniformly treated as taxable non-governmental payments, either by employers, unions, or "private" groups which have been similar to the Social Security benefits not taxed in their character as "subsistence relief," except for their private nature. See Numbers 1, 2, 5, 15, 19, 24 and 25. In the instances urged on us, the Commissioner has never treated such a non-governmental payment as non-taxable. Having uniformly accorded different treatment to small pension, old age, and unemployment payments, depending on their source, whether they arose out of a private arrangement on the one hand, or under the Federal Social Security program on the other, the Commissioner is not disentitled to treat these strike benefits as he has the non-governmental payments in the past. Surely there is a fair basis for differentiating, for income tax purposes, payments under a comprehensive scheme of federal welfare legislation from private payments, although their ultimate social purposes may be similar. To say that the Social Security rulings control private welfare schemes is to say that the Commissioner has not been entitled to find

in the policy of the Social Security legislation, in relation to the tax statutes, a reason for excluding its benefits from taxation, while this policy does not apply to other payments.

The remaining ruling, Number 22, deals with a state assistance payment to the blind. Aside from the differences which arise from the fact that this payment involved federal funds, which was set forth in the ruling as one of the relevant facts, it may well have been treated by the Commissioner as a gift, and not unreasonably so, for the blind are a common object of charity. In any case, this payment cannot alone create an administrative practice binding the Commissioner in the present case.

In summary, the relevant instances in which the Commissioner has ruled payments not taxable can all be explained according to principles other than the general principle of "subsistence relief" urged by the taxpayer. Putting aside the question of "gift," these principles do not cover the present case. Therefore the Commissioner, in seeking to tax these strike benefits, has not denied the taxpayer "equal" treatment.

No one argues that a tax principle regarding "subsistence relief" can be drawn from the statute or the cases. The taxpayer does urge, however, that a principle concerning "alleviative," "reparations" payments can and should be derived. I have already discussed why such a principle in my view does not include the present strike benefits, which compensate no loss but the loss of wages, and these would have been included in gross income if received. It might be argued that the Court should itself formulate a principle covering "subsistence relief" payments which would cover this case. There are controlling reasons for not formulating such a principle. Such new principles in the tax law are best left to Treasury initiative and congressional adoption. Moreover, the principle of excluding "subsistence" is already reflected in the \$600 personal exemption and the graduated rates.

Finding these strike benefits not otherwise outside the statutory concept of "gross income," the decisive factor for me in this case is whether the strike benefits are to be deemed a "gift." As a matter of ordinary reading of language I could not conclude that all strike benefits are, as a matter of law, "gifts." I should suppose that a strike benefit does not fit the notion of "gift." A union surely has strong self-interest in paying such benefits to strikers. The implications arising out of the relationship between a union which calls a strike and its strikers are such that, without some special circumstances, it would be unrealistic for a court to conclude that payments made by the union for which only strikers qualify, even though based upon need, derive solely from the promptings of benevolence.

In this case, however, under instructions to the jury that

"[t]he term 'gift' as here used denotes the receipt of financial advantage gratuitously, without obligation to make the payment, either legal or moral, and without the payment being made as remuneration for something that the Union wished done or omitted by the plaintiff. To be a gift, the payments must have been made with the intent that there be nothing of value received, or that they were not made to repay what was plaintiff's due but were bestowed only because of personal regard or pity or from general motives of philanthropy or charity. If the plaintiff received this assistance simply and solely because he and his family were in actual need and not because of any obligations, as above referred to, or any expectation of anything in return, then such payments were gifts."

the jury found in a special verdict that the strike benefit payments to taxpayer were a "gift." These instructions certainly were not unfavorable to the Government.

For me, then, the question is whether there is anything in this particular record to justify a jury in finding, as it must be deemed to have found under these instructions, that the payment to taxpayer was, unlike the ordinary strike benefit, wholly a benefaction because of need, uninfluenced by the union's self-interest in promoting the success of the strike. The trial judge held that the record precluded the jury's verdict; the Court of Appeals reinstated that verdict.

On the evidence in this case, may the jury's verdict stand? There was evidence justifying the view that in the particular circumstances existing in Sheboygan at the time these benefits were paid, the union had assumed the functions normally exercised by private charitable organizations and governmental relief programs, in view of the excessive difficulty in getting adequate relief from them, so that these benefits were dispensed pursuant to such a charitable relief program in what, because of the strike, was a distressed area. The mere fact that the payments were made by the union to men participating in a strike called by the union does not as a matter of tax law conclude the case against a "gift." When the circumstances negating the business nature of the payment were strong enough, the Commissioner has ruled that even payments by an employer to his employees were gifts. See ruling Number 13 in the Appendix, and see also Rev. Rul. 59-58, 1959-1 Cum. Bull. 17, holding that the value of turkeys, hams, etc., given by an employer to employees at Christmas or some other holiday need not be reported as income. Although it is for me a very close question, I find sufficient evidence in the record to support the theory that in making these payments the union was exercising a wholly charitable function. On this view, restricted to the particular set of circumstances under which the special verdict was rendered, I would therefore hold the payment

in this case to be a gift and would affirm the judgment below.

I am well aware that this disposition of the case does not preclude different juries reaching different conclusions on the same facts. Some individualization of result is inevitable so long as it is left to courts to determine what is or is not a "gift." The diversities that may thus result are all the more inevitable in view of the scope left to the fact-finders—whether courts or jury—by our decision today in *Commissioner v. Duberstein* and *Stanton v. United States*, — U. S. —.

APPENDIX:

As used in the citations to materials in this Appendix, "O. D." refers to an Office Decision, "I. T." to an Income Tax Ruling, "Sol. Op." to a Solicitor's Opinion, "G. C. M." to a General Counsel's Memorandum, "Rev. Rul." to a Revenue Ruling, and "T. D." to a Treasury Decision.

1. O. D. 552, 2 Cum. Bull. 72 (1920).

"Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received, there being no provision of law exempting such income from taxation."

2. I. T. 1293, I-1 Cum. Bull. 63 (1922).

"Amounts paid by an organized labor union as unemployed benefits to its unemployed members are required to be included in gross income of the recipients."

3. Sol. Op. 132, I-1 Cum. Bull. 92 (1922).

Damages for alienation of affections or defamation of character held not to be income. "In the light of these decisions of the Supreme Court [*Stratton's Independence v. Houbert*, 231 U. S. 339, and *Eisner v. Macomber*, 252 U. S. 189] it must be held that there is no gain, and therefore no income, derived from the receipt of damages for alienation of affections or defamation of personal character. In either case the right invaded is a personal right and is in no way transferable. While a jury endeavors roughly to compute the amount of damage inflicted, in the very nature of things there can be no correct estimate of the money value of the invaded rights. The rights on the one hand and the money on the other are incomparable things which can not be placed on opposite sides of an equation. If an individual is possessed of a personal right that is not assignable and not susceptible of any appraisal in relation to market values, and thereafter receives either damages or payment in compromise for an

invasion of that right, it cannot be held that he thereby derives any gain or profit." Revoking S. 1384, 2 Cum. Bull. 71, 72 (1920), which had held such damages taxable and relying on T. D. 2746 (unpublished) where "it was held that damages for personal injuries due to accident do not constitute income."

4. I. T. 1804, II-2 Cum. Bull. 61 (1923).

Damages for breach of promise to marry not gross income. "[A] promise to marry is a personal right not susceptible of any appraisal in relation to market values" Relying on Sol. Op. 132, *supra*, Number 3, and *Eisner v. Macomber*, 252 U. S. 189.

5. I. T. 1918, III-1 Cum. Bull. 121 (1924).

Payments to employees "involuntarily thrown out of employment because of lack of work in a certain industry." Payments made out of a fund established for that purpose under an agreement between "an association of manufacturers" and an "employee's association" and maintained by deductions from the wages of those employees who ratify the agreement and by equivalent contributions from the employers. *Held*, "Any benefits paid to the employee from the fund in excess of the amounts which he has contributed will constitute taxable income to him." Also held that employees may not deduct their contributions to the fund.

6. I. T. 2420, VII-2 Cum. Bull. 123 (1928).

Payment made to taxpayer for the death of her husband on the *Lusitania*. Payment made by the Government of Germany through the Mixed Claims Commission of the United States and Germany. *Held*, payment not income. "An award paid for the loss of a life is compensation for the loss, and as such is not embraced in the general concept of the term 'income.' In the instant case, the award

is, in fact . . . to restore [the recipient] . . . to substantially the same financial and economic status as she possessed prior to the death of her husband."

7. G. C. M. 4363, VII-2 Cum. Bull. 185 (1928); I. T. 2422, VII-2 Cum. Bull. 186 (1928).

Damages for breach of contract to marry are not income. Commissioner acquiesces in 9 B. T. A. 1340 which so holds. O. D. 501, 2 Cum. Bull. 70, and I. T. 2170, IV-1 Cum. Bull. 28, which held otherwise, revoked.

8. I. T. 3194, 1938-1 Cum. Bull. 114.

Lump sum payments under § 204 (a) of the Social Security Act, 49 Stat. 620, to "aged individuals not qualified for benefits [under § 202 of the Act]" upon their reaching age 65. Payments amount to $3\frac{1}{2}\%$ of the total wages paid to the individual with respect to employment after Dec. 31, 1936, and prior to reaching 65. *Held*, payments not subject to income tax.

9. I. T. 3229, 1938-2 Cum. Bull. 136.

Lump sum death payments under the "Federal old-age benefits" provisions in §§ 203 and 204 (b) of the Social Security Act to the estates of those deceased. Amount paid equals $3\frac{1}{2}\%$ of wages earned after Dec. 31, 1936, if death occurs before 65; if death occurs after 65 amount paid is the difference between what the deceased had already been paid under the Social Security Act and $3\frac{1}{2}\%$ of his total wages after Dec. 31, 1936, or the difference between what the deceased has already been paid under the Social Security Act and what he was entitled to be paid under that Act during his life, whichever difference is higher. *Held*, citing I. T. 3194, Number 8, *supra*, that "likewise" these payments are not subject to income tax.

10. I. T. 3230, 1938-2 Cum. Bull. 136-137.

Benefit payments made "under the Federal and State plan for unemployment compensation" by a state agency during unemployment periods. The payments are made from a fund held in the Treasury of the United States, established under the Social Security Act, called the Federal Unemployment Trust Fund. Money is deposited in the fund by the various States under the provisions of the Social Security Act. *Held*, payments not subject to income tax.

11. I. T. 3447, 1941-1 Cum. Bull. 191.

Monthly payments from the Federal Old Age and Survivors Insurance Trust Fund under § 202 of the Social Security Act, as amended, 53 Stat. 1360. *Held*, payments not subject to income tax.

12. Special Ruling, May 11, 1952, 1952-5 CCH Stand. Fed. Tax Rep. ¶ 6196.

Ruling was asked with regard to (1) whether money paid by the Red Cross as disaster relief "will affect the deductibility of losses sustained by the taxpayer in the casualty," and (2) whether disaster relief in the form of food, clothing, medical supplies, etc., will affect "the loss deduction [for casualty losses provided by the Code]." *Held*, amounts received "from the American Red Cross by a disaster victim in the form of cash or property for the purpose of restoring or rehabilitating property of the victim which was lost or damaged in the casualty should be applied to reduce the amount of the deductible loss sustained by the taxpayer," but "[f]ood, medical supplies, and other forms of subsistence received by the taxpayer which are not replacements of lost property do not reduce the size of the amount of any loss deduction to which he is otherwise entitled nor do they represent taxable income."

13. Rev. Rul. 131, 1953-2 Cum. Bull. 112.

Payments "for purposes of rehabilitation not actually compensated for by insurance or other sources" by a corporation to employees and their families who were injured or sustained damages as a result of a tornado. The size of the payments did not depend upon the length of service of the employee or the nature of his employment, and the ruling states that the payments were "not related to services rendered." *Held*, payments not taxable income. "Such contributions, measured solely by need, are considered gratuitous and spontaneous. The objective of the corporation is to try to place the employees in the same economic position, or as near to it as possible, which they had before the casualty."

14. Rev. Rul. 54-19, 1954-1 Cum. Bull. 179.

Monetary recovery by decedent's estate for death under state Wrongful Death statute. *Held*, recovery not taxable as income either to decedent's estate or to those who eventually receive the proceeds. "Proceeds of this nature, that is, compensation for loss of life, are not embraced in the general concept of the term 'income,'" citing I. T. 2420, Number 6, *supra*.

15. Rev. Rul. 54-190, 1954-1 Cum. Bull. 46.

Pension payments to employees from a fund administered by a union. Fund financed by compulsory employee contributions, based on earnings. It is not stated whether or how the benefits varied. Benefits payable only after age 60 to employees unable to keep their jobs and unable to get other regular employment because of age or disability. Benefits suspended when employee's wages reach a certain level. *Held*, payments subject to income tax. Since they are "directly attributable" to employment they are not without consideration and not gifts. "[a]ccordingly" they are income.

16. Rev. Rul. 55-132, 1955-1 Cum. Bull. 213.

Payments under the War Claims Act of 1948, 62 Stat. 1240, made by the United States to a former prisoner of war on account of an enemy government's violation of its obligation to furnish him humane treatment while held prisoner. *Held*, payments not subject to income tax because "in the nature of reimbursement for the loss of personal rights."

17. Rev. Rul. 55-652, 1955-2 Cum. Bull. 21.

Unemployment compensation payments made to federal employees pursuant to the Social Security Act, as amended, 68 Stat. 1130. Payments in amounts to equal payments employees would receive if covered by state unemployment compensation laws in States where employed and subject to the same conditions as such state payments would be. Payments made either by State, acting as agent of the United States, or by the Secretary of Labor. *Held*, payments not subject to income tax, relying on I. T. 3230, Number 10, *supra* (relating to state unemployment payments out of federally administered fund under the Social Security Act). The principle applied there considered equally applicable here.

18. Rev. Rul. 56-135, 1956-1 Cum. Bull. 56.

"Social security benefits" paid by the Republic of Panama under Panama law to United States citizens living and working in Panama. *Held*, not subject to income tax. "Such benefits are deemed to be basically similar to the sundry insurance benefit payments made to individuals under the United States social security system which are described and held to be not taxable to the recipients in I. T. 3447 [Number 11, *supra*]."

19. Rev. Rul. 56-249, 1956-1 Cum. Bull. 488.

Payments to unemployed workers at M. Co. made from fund to which only M. Co. contributes. Payments sup-

plement state unemployment benefits, and are only paid to employees eligible for state benefits. Payments are such that in combination with state benefits they give employee a certain percentage of his salary while laid off, which percentage depends on marital status, number of dependents and wage rate when laid off. Length of payment period depends on size of fund. *Held*, subject to income tax.

20. Rev. Rul. 56-518, 1956-2 Cum. Bull. 25.

Payments made by German Government to persons persecuted by Nazi German Government who suffered damage to "life, body, health, liberty, rights of property ownership, or to professional or economic advancement." *Held*, because the payments are "in the nature of reimbursement of the deprivation of civil or personal rights," where they are on account of property taken away they are not income so long as they are less than taxpayer's basis in the property. Where payments are greater than basis they may or may not be income depending on the circumstances of the case. No ruling made with regard to payments not on account of property taken away.

21. Rev. Rul. 57-1, 1957-1 Cum. Bull. 15.

Strike benefit payments made on the basis of need to strikers without regard to union membership. *Held*, taxable. Payments are not gratuitous because for the union's purposes. No conflict with I. T. 3230 (Number 10, *supra*, relating to state unemployment payments under Federal Fund), or I. T. 3447 (Number 11, *supra*, relating to Federal Social Security Insurance payments), because "the benefits in those cases were held not to constitute taxable income because it was believed that Congress intended that such benefits be not subject to tax," and there is no evidence of such intent here. No conflict seen with Rev. Rul. 131 (Number 13, *supra*), relating to corporation's

payments to rehabilitate employees after tornado, because payments there were gratuitous and donative. Rev. Rul. 54-190 (Number 15, *supra*), relating to pension payments from a union fund financed by dues, relied upon.

22. Rev. Rul. 57-102, 1957-1 Cum. Bull. 26.

Payment to a blind person under the Public Assistance Law of Pennsylvania, for the purpose of "providing for and regulating assistance to certain classes of persons requiring relief." The law authorizes the State "to cooperate with, and to accept and disburse money received from the United States Government for assistance to such persons." *Held*, payments not taxable as income for they constitute "a disbursement from general welfare fund in the interest of the general public."

23. T. D. 6272, § 1.61-11 (b), 1957-2 Cum. Bull. 18, 30.

"Pensions and retirement allowance paid either by the Government or by private persons constitute gross income unless excluded by law. . . ."

". . . Amounts received as pensions or annuities under the Social Security Act or the Railroad Retirement Act are excluded from gross income."

24. Rev. Rul. 57-383, 1957-2 Cum. Bull. 44.

Payments to unemployed workers from union unemployment fund financed through dues. Plan^a similar to insurance, employee choosing beforehand the class of benefits desired, and paying dues accordingly. *Held*, taxable.

25. Rev. Rul. 59-5, 1959-1 Cum. Bull. 12.

Benefit payments from "private" unemployment fund financed by dues from members. Dues vary with class of benefits desired. *Held*, payments are income to the extent that they exceed the contributions to the fund of the recipient. "In the absence of any provision in the

Code which expressly excludes unemployment benefits derived from private sources from Federal income taxation, the rationale of the above-cited case [*United States v. Glenshaw Glass*, 348 U. S. 426] and Revenue Ruling [Rev. Rul. 57-383, Number 24, *supra*, relating to unemployment benefits from union fund financed through dues] is applicable." "[E]ach member must contribute to the fund an amount in relation to the benefits which he desires ultimately to receive. Therefore, the benefits, when received, do not constitute amounts gratuitously paid or received so as to be considered gifts." Citing Rev. Rul. 54-190 (Number 15, *supra*, relating to pension payments from union fund financed by dues).

SUPREME COURT OF THE UNITED STATES

No. 55.—OCTOBER TERM, 1959.

United States, Petitioner,	} On Writ of Certiorari to the	
v.		United States Court of Ap-
Allen Kaiser.		peals for the Seventh Cir- cuit.

[June 13, 1960.]

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

The question here is whether, in the light of the rule adopted by the Court today in *Commissioner v. Duberstein*, ante, p. —, there is a reasonable basis in the evidence to support the jury's conclusion that the strike benefits paid to respondent by the union were nontaxable "gifts," within the meaning of § 102 (a) of the 1954 Internal Revenue Code.¹

With deference, I am convinced that there was not, and that, to the contrary, the evidence compels the conclusion, as a matter of law, that those strike benefits were not "gifts" within the meaning of § 102 (a), as construed by the Court in the *Duberstein* case.²

¹ Section 102 (a) provides: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance." 26 U. S. C. § 102 (a).

² Although the Court apparently considers it unnecessary to decide whether the strike benefits received by respondent constitute "income," and deals only with the question whether they were excludable "gifts," I think it is clear that those payments were "income." Strike benefits constitute realized *gains* to their recipients, as a partial substitute for lost wages rather than lost capital, and are materially different in nature from the various categories of realized gains which have been treated as nontaxable through administrative fiat. (See the Treasury Rulings detailed in MR. JUSTICE FRANKFURTER'S con-

The International Union is a private labor organization serving as the certified bargaining agent and representative of numerous collective bargaining units of employees. One of its principal purposes, as stated in its constitution, is to call, or approve the call by its local unions, of strikes to obtain better wages, hours and working conditions for those employees, and, of course, to win such strikes. To that end, its constitution provides for the creation of a Strike Fund, out of the dues of its members, for use in assisting its local unions in waging and winning such strikes, and it has actually created and maintains such a strike fund.³ Article 12, § 15 of its constitution further provides that:

"If and when a strike has been approved by the International Executive Board, it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union."

Thus there is a clear and specific undertaking by the International Union to furnish assistance to its striking members when, as here, it has approved the strike, and the union has created and maintains a fund for that purpose.

curing opinion.) Strike benefits are, therefore, within the reach of the "gross income" provision of the Code. See *Commissioner v. Glenshaw Glass Co.*, 348 U. S. 426, 429-430.

³ The evidence shows an administrative letter was written by the International to its locals describing the nature and purpose of its strike fund as follows:

"The International Union, UAW-CIO, has also established a Strike Fund to further assist Local Unions in winning current strikes and to build a fund to protect our members in any future strikes. The Strike Fund of the International Union, UAW-CIO, is not large enough to provide strike assistance on the basis of right, and is not sufficient to meet all the needs of our members during strike periods."

Although the mentioned provisions of the International's constitution relate to financial assistance to union members, it was stipulated at the trial that:

"The International Union grants strike benefits to non-members of the Union who participate in a strike, if they do not have sufficient income to purchase food or to meet an emergency situation. The Union treats such non-members on the same basis as members of the Union, but non-members as well as members *must be strikers before they may receive assistance from the Union.*" (Emphasis added.)

It was further stipulated that respondent, who was not a member of the union during the early months of the strike, "received from the International Union" strike benefits totaling \$565.54 during the taxable year 1954.*

It is now established that objective intention of the transferor determines whether transfers constitute "gifts," within the meaning of § 102 (a). *Bogardus v. Commissioner*, 302 U. S. 34; *Commissioner v. Duberstein*, ante, p. —. In *Duberstein*, the Court, in attempting to shed additional light on the factors determinative of whether requisite donative intent impelled the transfer, said:

"This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a 'gift' within the meaning of the statute. . . . And, importantly, if the payment proceeds primarily from 'the constraining force of any moral or legal duty,' or from

* While the Court of Appeals emphasized respondent's status as a nonmember when he began receiving strike benefits from the union, the parties' stipulation nullifies any possible basis for distinguishing between members and nonmembers in deciding the question before us, and, indeed, the Court does not purport to rest its decision on any such distinction.

'the incentive of anticipated benefit' of an economic nature . . . it is not a gift. . . . A gift in the statutory sense, on the other hand, proceeds from a 'detached and disinterested generosity,' . . . ; 'out of affection, respect, admiration, charity or like impulses,'" *Commissioner v. Duberstein, ante*, at p. —.

I find nothing in this record to indicate that the strike benefit payments by the union to respondent and other striking workers, while they were waging the strike, were made out of any "detached and disinterested generosity," or "out of affection, respect, admiration, charity or like impulses." To the contrary, it seems plain enough that those payments were made by the union to enable and encourage respondent and other striking workers to continue the strike which had been called or approved by the union, and were not motivated by benevolence. Those payments were therefore made in furtherance of one of the union's principal economic objectives—the winning of the strike—and hence proceeded primarily from "the incentive of anticipated benefits" of an economic nature" to the union, and from "the constraining force" of the union's promise to assist striking workers in winning the strike. *Duberstein, ante*, p. —. Because of the economic advantages to be obtained by the union from winning the strike, the union had a manifest self-interest in financially sustaining the strikers while they carried on its strike. This shows, as a matter of law, that the payments were not made with the donative intent required to constitute "gifts" within the meaning of § 102 (a) and of the *Bogardus* and *Duberstein* cases. Wholly apart from the immediate objective which the union sought to achieve by paying these strike benefits, they could qualify as "gifts," as the Court recognizes, only if they were made, as said in *Duberstein*, with a "detached and distin-

terested generosity," and this record shows that it was principally private business purposes, not detached and disinterested generosity, that prompted the union to make the payments in question.

To be sure, the International's Secretary-Treasurer expressed his conclusion at the trial that, in the course of this strike, the International carried out the "same function" as would a local welfare agency in furnishing assistance to needy persons. But it is important to distinguish the very different factors that impelled the union from those that motivate a local welfare agency in furnishing such assistance. The union made payments only to strikers to sustain them while they carried on the strike, whereas, a welfare agency assists the needy solely from humanitarian impulses, without purpose to obtain any benefit for itself, and whether the needy recipients are strikers or not. Public welfare payments represent the charitable response of the community to relieve hardships arising from conditions beyond its control; but the strike benefits shown by this record were designed, principally at least, for the purpose of sustaining the strikers while they carried on the union's strike to victorious end. The motivation of a public welfare agency in supplying basic needs to the unemployed is purely charitable in nature, but payments by a private union to striking workers to enable them to continue to successful conclusion a strike called or approved by the union, cannot reasonably be said to have proceeded primarily from any such charitable impulse.³

³ That voluntary payments by a union may be and often are made with the requisite donative intent is not to be doubted. This was illustrated by the testimony of two union officials at the trial of this case. The Secretary-Treasurer testified about expenditures from the union's strike fund to assist in emergencies caused by a tornado at Flint, Michigan, and by a flood in Connecticut. A regional officer testified that the union purchased furniture for a member whose home

This conclusion is fortified by the consistent and long-standing rulings of the Treasury Department. It has twice ruled that strike benefits do not constitute non-taxable "gifts" to the recipient. In 1920 it held that:

"Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received, *there being no provision of law exempting such income from taxation.*" O. D. 552, 2 Cum. Bull. 73 (1920). (Emphasis added.)

And again in 1957, it ruled:

"Strike benefit payments are included within the broad definition of gross income and *do not fall within any of the exclusions provided for in the Code, including the exclusions for gifts under section 102.* They are paid only upon the event of a strike which is a means employed by the union and its members for securing economic benefits, and, for this reason, they do not constitute amounts gratuitously paid or received.

"Accordingly, the strike benefit payments received under these circumstances *do not constitute gifts* but constitute income and are includible in the gross income of the recipients even though distributed on the basis of their need and regardless of whether the recipients are members or nonmembers of the union." Rev. Rul. 57-1, 1957-1 Cum. Bull. 15, 16-17. (Emphasis added.)

and its furnishings had burned, viewing that action, somewhat differently than these strike benefits, as an "outright donation" by the union. But plainly such were not the generous and charitable impulses that impelled the union to pay the strike benefits to respondent and other strikers to sustain them while they waged the union's Kohler strike.

Nor do I find in this record any "special circumstances" which might support the jury's conclusion that the payments made to respondent were "gifts." The record shows that it was the union's policy at the time of this strike to require strikers to avail themselves of any assistance offered by local community agencies before seeking assistance from the union. However, the union decided to waive this requirement with regard to the strike involved here, for the reasons given by the International's Secretary-Treasurer:

"In this particular case, the community assistance available in Sheboygan County was so small, and so much red tape involved in obtaining it, we decided that Kohler workers would not have to seek assistance from the community agencies."

"The policy in 1954 was to use community agencies but, as I testified previously, that in the case of the Kohler workers we waived that particular policy because, after checking with the Sheboygan Welfare Agency, we found that the Kohler workers were expected to give up their license plates and not use their automobiles, and restrictions were so great that we didn't think we ought to impose those restrictions on the Kohler workers."

This determination was further evidence that the union's purpose in making the payments to respondent and other strikers was a business one, not proceeding from any "detached and disinterested generosity" nor "out of affection, respect, admiration, charity or like impulses," *Dubenstein, ante*, p. —, but proceeding, rather, from the unions business purpose to obviate the supposed oppression of the local welfare restrictions upon the strikers, and thereby more effectively to preserve and continue the strike. It corroborates, I think unmistak-

ably, the union's business purpose in paying the strike benefits, and shows that no genuine charitable or donative intent was involved.

For these reasons I would reverse the judgment of the Court of Appeals and hold that the payments in question were not "gifts" but were "income" and taxable as a matter of law.